TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 535.

ROBERT A. LUCAS, PLAINTIFF IN ERROR,

vs.

PETER C. BROOKS, JR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED DECEMBER 14, 1871.

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1 UNITED STATES OF AMERICA, *ss :*

Pleas before the Hon. John J. Jackson, j'r, judge of the district court of the United States for the district of West Virginia, held at Wheeling on the 31st day of May, 1871.

Be it remembered that, heretofore, to wit, at rules held at the clerk's office of said court, on the first Monday in January, 1871, came Peter C. Brooks, j'r, the plaintiff, by his attorney, and filed his declaration against Robert A. Lucas of a plea of ejectment; which declaration and the notice and affidavit thereon endorsed, are in the words and figures following:

Declaration.

District court of the United States.

Peter C. Brooks, jun'r, a citizen of the State of Massachusetts, complains of Robert A. Lucas, a citizen of the State of West Virginia, in a plea of trespass & ejectment; for that, on the 1st day of January, 1869, at the county of Jefferson, in the State of West Virginia, the plaintiff was lawfully seized and possessed in fee simple of a certain tract or parcel of land in the said county of Jefferson, containing
2 293¼ acres of land, of the value of $25,000, the same tract of land conveyed by Edmund I. Lee, as special commissioner, to R. D. Shepherd, by deed recorded deed book No. 39, page 47, recorder's office of Jefferson, which was leased by the said R. D. Shepherd to the defendant, Robert A. Lucas, on the 30th of January, 1859, and which, under the will of the said R. D. Shepherd & partition made of his estate, now belongs to the plaintiff, & which was leased to the defendant Robert A. Lucas, & upon which the said Robert A. Lucas now lives; & being so seized & possessed thereof, afterwards, to wit, on the 1st day of April, 1870, at the county aforesaid, the said defendant entered upon said premises & now unlawfully withholds & detains the same from the plaintiff to the damage of the plaintiff of $5,000; & therefore he sues.

CHARLES J. FAULKNER, *P. Q.*

Notice.

To ROBERT A. LUCAS:

This is to give you notice that the above and annexed declaration will be filed in the clerk's office of the district court of the United States for the district of the State of West Virginia, held at Clarksburg, in that State, on Monday, the 2nd day of January, 1871, it
3 being rule-day; & that if you fail to appear and plead thereto within the time required by law, judgment will be given against you.

PETER C. BROOKS, JUN'R,
By CHARLES J. FAULKNER,
His Attorney.

Affidavit.

JEFFERSON COUNTY:

This day James D. Fayman personally appeared before me & made oath that he delivered to Robert A. Lucas a copy of the above declaration & notice, on the fourteenth day of December, 1870. Given under my hand this 14th day of December, 1870.

SEAL CIRCUIT COURT, JEFFERSON COUNTY, WEST VA.

W. A. CHAPLINE,
Clerk Cir. Court.

And it appearing by the affidavit of James D. Fayman that Robert A. Lucas, tenant in possession of the premises, hath been duly served with the said declaration and notice, and said defendant not appearing, on motion of the plaintiff, by his attorney, common order was entered against him; which common order, with the return and affidavit
4 of service of the same thereon made, are in the words and figures following:

Common order.

At rules held in the clerk's office of the district court of the United States for the district of West Virginia, at Clarksburg, for the month of January, 1871.

PETER C. BROOKS, J'R, A CITIZEN OF THE State of Massachusetts,
vs.
ROBERT A. LUCAS, A CITIZEN OF THE STATE West Virginia.

In ejectment for a certain tract or parcel of land in the county of Jefferson, and State of West Virginia, containing 293¼ acres of land.

This day came the plaintiff, by his attorney, and filed his declaration against the defendant with a notice in writing thereto subjoined from the plaintiff to the said defendant, notifying him that the said declaration would be filed at rules on the first Monday in January, 1871, it being a rule-day in the clerk's office of said court, together with an affidavit thereto attached; whereupon, it appearing by the said affidavit that the said defendant has been duly served with a copy of the said declaration and notice, and he not appearing, it is ordered that if he, upon
5 due service of this rule, *he* shall fail to appear here on the first Monday in February next, at rules to be held in the clerk's office of the said court, and plead to the said declaration, his default will be entered and judgment given for the plaintiff, and a writ of possession awarded him.

JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. Va.

Return.

Executed the within rule on Rob. A. Lucas, by delivering to him a true copy of the same, this 1st day February, 1871.

GEO. W. CHASE, *Sheriff.*

Affidavit.

Personally appeared before me George W. Chase, sheriff Jefferson County, West Virginia, and made oath in due form of law that he executed a true copy of the within rule upon Robert A. Lucas according to his return.

In testimony whereof I have hereunto set my hand and affixed the seal of the circuit court within and for said county, at Shepherdstown, West Virginia, this 1st day of February, 1871.

SEAL. CIRCUIT COURT JEFFERSON CO., WEST VIRGINIA.

W. A. CHAPLINE,
Clerk Cir. Court.

6 And at another day, to wit, at rules, held at the clerk's office of said court, on the first Monday in the month of February, 1871, the defendant, by his attorney, demurred generally to the plaintiff's declaration; in which demurrer the plaintiff joined; and the defendant, for plea, said he was not guilty in manner and form as the plaintiff, in his declaration against him, had complained; and of this he put himself upon the country; and the plaintiff did the like.

At another day, to wit, at a district court of the United States for the district of West Virginia, held at Clarksburg, West Va., on the 24th day of March, 1871:

This day came the parties, by their attorneys, and, by consent, this cause is remanded to the next term and session of this court, to be held at Wheeling, in this district, for a trial thereof to be had.

At another day, to wit, at a district court of the United States for the district of West Virginia, held at Wheeling, in said district, on the 25th day of May, 1871:

7 This day came the parties, by their attorneys, and thereupon came a jury, to wit: Philip Kuhn, Robert Dalzell, William Gramm, Richard Blum, James M. Ferrell, James C. Allison, John Slack, jr., Alonzo Wilson, Zachariah Jacobs, John M. Doddridge, John E. McKennon, and William Dillon; all good and lawful men of this judicial district, who, being elected, tried, and sworn to well and truly try the issue in this cause: and the demurrer and joinder heretofore entered in this cause not having, by omission, been disposed of before the impanneling of the jury in this cause, and nothing being offered in support of said demmrrer, it is considered by the court, that the same be overruled; and the jury having partly heard the evidence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

At another day, to wit, at a district court of the United States for the district of West Virginia, held at Wheeling, in said district, on the 26th day of May, 1871:

8 This day came the parties, by their attorneys, and the jury impaneled and sworn in this cause again appeared in court, according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

At another day, to wit, at a district court of the United States for

the district of West Virginia, held at Wheeling, in said district, on the 27th day of May, 1871:

This day came as well the parties, by their attorneys, and the jury empanneled and sworn in this cause again appeared in court, according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause, on this day the jury are adjourned over until Tuesday morning next at 10 o'clock.

9 At another day, to wit, at a district court of the United States for the district of West Virginia, held at Wheeling, in said district, on the 30th day of May, 1871:

This day came as well the parties, by their attorneys, as the jury impanneled and sworn in this cause, who again appeared in court, according to their adjournment on Saturday last, and having fully heard the evidence, and the argument of counsel not being concluded, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

And now at this day, to wit, at a district court of the United States for the district of West Virginia, held at Wheeling, in said district, on the 31st day of May, 1871.

This day came again the parties, by their attorneys, and the jury, impanneled and sworn in this cause, again appeared in court, according to their adjournment on yesterday, and, having fully heard the evidence and argument of counsel, retired to their chamber to consider of their verdict, and, after some time, returned into court, and upon their oaths do say:

10 We, the jury, find for the plaintiff the land and premises in the declaration mentioned. And thereupon the defendant moved the court to set aside the verdict of the jury, and grant him a new trial herein for reasons here filed; and, the court having fully considered whereof, doth overrule the same.

Therefore it is considered by the court that the plaintiff recover the possession of the premises in the declaration mentioned, according to the verdict of the jury aforesaid, and his costs by him about his suit in this behalf expended; and, on motion of plaintiff, a writ of possession is awarded him, returnable, &c.; but no execution or writ of possession shall issue upon this judgment for a period of ninety days from this time.

MEMO.—On the trial of the above cause the defendant, by his attorney, excepted to an opinion of the court given therein, and tendered his bills of exceptions, which are here signed, sealed, and ordered to be made a part of the record in this cause.

Bill of exceptions.

11 PETER C. BROOKS, JR., vs. ROBERT A. LUCAS. } In ejectment.

Be it remembered that, on the trial of this cause, the plaintiff, to sustain the issue on his part offered in evidence a transcript of a record of a suit in chancery lately depending in the circuit court of Jefferson County, West Virginia, wherein Benjamin T. Towners, adm'r, was complainant, and Edward A. Lucas, ex'or, & heirs were defendants, of

which the defendant, Robert A. Lucas, was one, in the words and figures following:

12 RECORD, (marked 1.)

WEST VIRGINIA:

Be it remembered that among the record of proceedings of the circuit court of Jefferson County, West Va., are the following, viz:

The Commonwealth of Virginia to the sheriff of Jefferson County, greeting:

We command you that you summon Charles W. Lucas, executor of Edward Lucas, dec'd, and in his own right; Frances Lucas, the widow of the said deceased; Lewis Lucas, Edward Lucas, Robert A. Lucas, Benjamin Lucas, John Lucas; the children of George Lucas, dec'd, a son of Edward Lucas, dec'd, whose names are unknown; Francis Shepperd and Margaret, his wife, late Margaret McMurran; George W. McMurran, Edward P. McMurran, and Elizabeth McMurran, to appear at the clerk's office of our circuit court of Jefferson County, at the court-house of the said county, on the first Monday in next month, to answer a bill in chancery exhibited against them in the said court by Thomas H. Towner, administrator of Benjamin T. Towner, dec'd; and have then there this writ.

13 Witness Robert T. Brown, clerk of our said court, at the court-house, the 15th day of March, 1858, and in the 82nd year of our Commonwealth.

ROBERT T. BROWN.

(Endorsed:) Executed by giving a copy to each defendant.

ROBERT LUCAS, *Sh'ff.*

The Commonwealth of Virginia to the sheriff of Berkeley County, greeting:

We command you that you summon Charles W. Lucas, executor of Edward Lucas, dec'd, and in his own right; Frances Lucas, the widow of the said deceased; Lewis Lucas, Edward Lucas, Robert A. Lucas, Benjamin Lucas, John Lucas; the children of George Lucas, dec'd, a son of Edward Lucas, dec'd, whose names are unknown; Francis Shepherd and Margaret, his wife, late Margaret McMurran; George W. McMurran, Edward P. McMurran, and Elizabeth McMurran, to appear at the clerk's office of our circuit court of Jefferson County, at the court-house of the said county, on the first Monday in next month, to answer a bill in chancery exhibited against them in the said court by

14 Thomas H. Towner, administrator of Benjamin T. Towner, dec'd, and have then there this writ.

Witness Robert T. Brown, clerk of our said court, at the court-house, the 15th day of March, 1858, and in the 82nd year of our Commonwealth.

ROB'T BROWN.

(Endorsed:) Berkeley County. Executed April 2nd, 1858, by delivering to Francis Shepherd & Margaret, his wife; John Lucas, Charles Lucas, each a copy in person, & by leaving a copy at the residence of Benj. Lucas, with his brother Cha's Lucas, who is a person above the

age of 16 years, and explaining to him the purport of said process, said defendant being absent.

B. CUSHWA, *S. B. C.*

1858.—March rules.

Bill filed as follows:

To the Honorable Richard Parker, judge of the circuit court of Jefferson County:

Your orator, Thomas H. Towner, administrator of Benjamin T. Towner, dec'd, respectfully complaining, showeth: That, at the May term, 1844, of the late circuit superior court of law and chancery for Jefferson County, the said Benjamin T. Towner, then living, recovered
15 a judgement against a certain Edward Lucas for $2,000.00, with interest thereon at six per centum per annum from December 31st, 1841, till paid, and for $6.55 costs of suit; and that at the May term of said circuit superior court, which commenced on 19th May, 1845, the said Benjamin T. Towner recovered another judgement against the said Edward Lucas for $2,000.00, with like interest from December 31st, 1841, till paid, and for $6.55 costs of suit; and that the said B. T. Towner recovered another judgement against said Edward Lucas at the May term, 1846, of said circuit superior court for $2,169.21, with like interest from December 31st, 1841, till paid, and for $6.55 costs of suit; and each of said judgements was regularly docketed in the judgement-docket in the clerk's office of the county court of Jefferson County, within a year after its rendition.

And your orator further saith that the said Benjamin T. Towner is since dec'd intestate, and letters of administration have been granted on his estate to your orator by the county court of Jefferson
16 County; and the said Edward Lucas has also since died, in the year 1849, having published his last will and testament, which was proved before the circuit superior court for said county, and admitted to record; and letters-testamentary have been granted to Charles W. Lucas, executor, appointed by said will. By his will he gave to his wife, Frances Lucas, a number of negroes, his household and kitchen furniture, his horses, cattle, stock, farming implements, &c., for her life, exempt from payment of his debts; and he gave the reversion and the rest of his property to his children and grand-children, as will appear by a copy of the will, which is herewith exhibited as part hereof, (marked Pl'ff Exhibit No. 1,) as follows:

"In the circuit court of Jefferson County, Virginia.

"I Edward Lucas, sen'r, of Jefferson County, Virginia, do make and publish my last will and testament, in manner and form following:

"First. I give and bequeath unto my beloved wife Frances all the following-named slave' now in my possession and hired out, viz: Giles, George, and William; also, Sidney and her three children, to wit,
17 Tom, Fanny, and Giles; also, Ellen and her three children, Joseph, Betty, & David; and also all the household and kitchen furniture, together with all horses, cattle, and stock, & farming implements of all sorts in my possession, or that may be, including the increase on her farm, where I live: To have & to hold all the said slaves & other property for and during her natural life; it being my will and desires that my debts, including the liability under the trust-deed to my son Robert, shall be paid out of my other property, to the exemption of this given to my wife, she having released her dower in the farm sold to my son

Robert, with the understanding that she was to be secured, or was to receive a fair consideration.

"Second. It is my will and desire that the balance of my property of every kind soever, including what I have given to my wife, shall be equally divided among all my children, giving to the children of my son George, & to those of my daughter Betsey McMurran, the shares that their father and mother if living would take, and char'ing my
18 son Robert with the three thousand dollars in the sale of the farm to him in addition to the price recited in the deed to him, the consideration having been eighteen instead of fifteen thousand dollars; but should he pay over to my son John fifteen hundred dollars, then charging him and John each with fifteen hundred dollars in the said division among my children and descendants.

"The property, given to my wife in the first clause, including the slaves, of course is not given to my children & the descendants of the two deceased ones during the life of my wife, but is to be divided after her death.

"And the amount due to me from my sons Robert & John, under the lease of my farm, &c., before I sold it to Robert, is also to be charged to them, unless paid before my death, in the division aforesaid.

"Lastly I do hereby nominate and appoint my sons Lewis & Charles W. Lucas, executors of this my last will and testament, hereby revoking and annulling all other and former wills by me heretofore made.

"In witness whereof I have hereto set my hand & seal this 30th day April, 1849.

19 "EDWARD LUCAS. [SEAL.]

"Signed, sealed, and declared, published & delivered by the said Edward Lucas, sen'r, as & for his last will and testament in our presence, who were requested by him to subscribe the same as witnesses.

"J. B. WAUGH.
"DANIEL HENDRICKS.
"WILLIAM HENDRICKS.

"In the circuit superior court of law and chancery for Jefferson County, October 25th, 1849.

"The last will and testament of Edward Lucas, sen'r, deceased, was this day proved by the oaths of James B. Waugh, Daniel Hendricks, and William Hendricks, three subscribing witnesses thereto, and ordered to be recorded. And Lewis Lucas, one of the executors therein named, appeared in court, and refused to take upon himself the burthen of the execution thereof, and renounced his right to qualify as executor under the said will; and, on the motion of Charles W. Lucas, the other executor named in the said will, who made oath thereto, and, together with Robert A. Lucas, William McMurran, Montgomery Slem-
20 ons, and Lewis Lucas, his securities, entered into and acknowledged a bond in the penalty of twenty-five thousand dollars, conditioned as the law directs, certificates granted him for obtaining a probate of the said will in due form.

"Teste: ROBERT T. BROWN, *Clk.*

"A copy. Teste: ROBERT T. BROWN, *Clk.*

The said Edward Lucas, in his life-time, sold to a certain Robert A. Lucas, his son, a tract of land in Jefferson County, viz, in 1848, containing about 300 acres of land, and conveyed it to him by deed, dated

Sept'r, 1848, which is of record in the clerk's office of the county court of said county, a copy whereof is herewith exhibited as a part hereof, marked Pl'ff Exhibit No. 2.

"This indenture, made this nineteenth day of September, in the year of our Lord one thousand eight hundred and forty-eight, between Edward Lucas and Fanny, his wife, of Jefferson County, Virginia, of the one part, and Robert A. Lucas, of the same county, of the other part, witnesseth: that the said Edward Lucas and Fanny, his wife, for
21 and in consideration of the sum of fifteen thousand dollars, current money of the United States, to the said Edward Lucas in hand paid by the said Robert A. Lucas, the receipt whereof is hereby acknowledged, do, by these presents, give, grant, bargain, sell, alien, and confirm unto the said Robert A. Lucas, his heirs and assigns, that tract or parcel of land, upon which he, the said Edward Lucas, has heretofore resided, and upon which said Robert Lucas, jr., now resides, situated in the county of Jefferson aforesaid, being the land devised to the said Edward Lucas, by his father, Edward Lucas, sen'r, the general boundaries of which are as follows: Beginning at a stone, corner, marked (E. L.) corner to the original patent; thence with the original line and with the lines of Walter B. Selby & John H. McEndree, to a stone, corner to Robert Lucas; thence in a southerly direction with Robert Lucas' line, binding with him, and crossing the branch to corner at the old still-house; thence with R. Lucas' line to a white-oak, a corner; thence with said R. Lucas' line to a stone, corner; thence again with said R. Lucas line to three walnuts, another corner, to R. Lucas; thence
22 with his line crossing the Charlestown road to a corner of the original patent; thence with R. Lucas' line to a stone, another corner of R. Lucas; thence with his line to the land, formerly W'm Deleya; thence with Deleya's and Ronemier's line to a stone, corner to Hendrick's; thence with Hendrick's line to Melvin's corner; thence to a stone, marked "A. L.;" thence to the beginning: containing about three hundred acres, more or less, and all appurtenances whatsoever to the said tract or parcel of land, belonging or in any wise appertaining: To hold the said hereby-granted premises and appurtenances unto the said Robert A. Lucas, junior, his heirs and assigns forever, to their only proper use. And the said Edward Lucas, for himself, his heirs, executors, and administrators, covenants with the said Robert Lucas, j'r, his heirs and assigns, that he, the said Edward Lucas, is now, at the time of the sealing and delivery of these presents, seized in his own right of a good and absolute estate in fee-simple in the said tract or parcel of land hereby granted, and appurtenances, without any manner of
23 cumbrance; and, also, that the said Edward Lucas and Fanny, his wife, and their heirs will, at any time hereafter at the request and at the costs of the said Robert A. Lucas, his heirs and assigns, execute and acknowledge any further deeds for the more certain assuring and conveying the said tract or parcel of land and appurtenances unto the said Robert A. Lucas, his heirs and assigns, according to the true intent and meaning hereof; and, lastly, that the said Edward Lucas, and his heirs and assigns, against the claim and demand of all persons whatever, shall and will warrant and forever defend by these presents.

"In witness whereof the said Edward Lucas and Fanny, his wife, have hereunto set their hands and seals the day, month, and year first herein written.

"EDWARD LUCAS. [SEAL.]
"FRANCES LUCAS. [SEAL.]

"VIRGINIA, *Jefferson County, set:*

"We, Richard Duffield & Alex. R. Boteler, two justices of the peace for the county aforesaid, in the State of Virginia, do hereby certify
24 that Edward Lucas, of the said county, party to the within deed, personally appeared before us in our county aforesaid, and acknowledged the same to be his act and deed for the purposes therein expressed, and desired us to certify his said acknowledgement to the clerk of the county court for said county of Jefferson, in the State of Virginia, in order that the said deed may be recorded.

"Given under our hands & seals this 19th day of September, 1848.

"RICH'D DUFFIELD. [SEAL.]
"AL'X'R R. BOTELER. [SEAL.]

"VIRGINIA, *Jefferson County, set:*

"We, Richard Duffield & Alex. R. Boteler, two justices of the peace for the county aforesaid, in the State of Virginia, do certify that Fanny Lucas, the wife of Edward Lucas, party to the within deed, personally appeared before us in our county aforesaid, and having the said deed fully explained to her, and being by us examined privily and apart from her said husband, she acknowledged that she had willingly and of her own accord signed, sealed, & delivered the same as her act and deed, and wished not to retract it, and desired us to certify her
25 said acknowledgement to the clerk of the county court for Jefferson County, Virginia, in order that the said deed may be recorded.

"Given under our hands and seals this 19th day of September, 1848.

"RICHARD DUFFIELD. [SEAL.]
"ALEX'R R. BOTELER. [SEAL.]

"JEFFERSON COUNTY, *set:*

"At a court held for the said county, on the 16th day of October, 1848, the foregoing deed was produced to the court and ordered to be recorded.

"Teste: T. A. MOORE, *Clerk.*"

Your orator does not know whether he was seized and possessed of any other real estate at the date of said judgements.

Your orator also exhibits, as part hereof, an office copy of said judgements, marked Pl'ff's Exhibit No. 3, and certificate of their having been docketed on the judgement-docket, in the clerk's office of the county court of said county, on Exhibit No. 3, as follows:

"STATE OF VIRGINIA, *Jefferson County, to wit:*

"BENJAMIN T. TOWNER, PLAINTIFF,
"*against* } In debt.
"EDWARD LUCAS, DEFENDANT.

"At a term of the circuit superior court of law and chancery
26 for Jefferson County, commencing the 18th day of May, 1844, the plaintiff recovered against the defendant in the above-named suit, judgement for $2,000.00 for debt, with interest thereon, to be computed at the rate of six per centum per annum, from the 31st day of December, 1841, till paid, and $6.55 *cts*, costs of suit.

"The above judgement docketed in the clerk's office of the county court of Jefferson County, on the 28th day of December, 1844.

"Teste: T. A. MOORE, *Clerk.*

"THE SAME, PL'FF
"*against*
"THE SAME, DEF'T. } In debt.

"At a term of the said court, held for the said county, and commencing the 19th day of May, 1845, the said plaintiff recovered against the said defendant judgement for $2,000.00 for debt, with interest thereon, to be computed at the rate of six per centum per annum from the 31st day of December, 1841, till paid, and $6.55 *cents*, costs of suit.

"The above judgement docked in the clerk's office of the county court of Jefferson County on the 27th day of March, 1846.

"Teste: T. A. MOORE, *Clk.*

27 "THE SAME, PLAINTIFF
"*against*
"THE SAME, DEFENDANT. } In debt.

"At a term of the said court, held for the said county, and commencing the 18th day of May, 1846, the said plaintiff recovered against the said defendant judgement for $2,169.21 *cts.* for debt, with interest thereon, to be computed at the rate of six per centum per annum, from the 31st day of December, 1841, till paid, and $6.55 *cents*, costs of suit.

"The above judgement docketed in the clerk's office of the county court of Jefferson County, June 12th, 1846.

"Teste: T. A. MOORE, *Clerk.*

"True copies.

"Teste: ROBERT T. BROWN,
"*Clerk of the Circuit Court of Jefferson County, Va.*

"In the circuit court of Jefferson County, Virginia.

"THOMAS H. TOWNER, ADMINISTRATOR OF
"Benjamin T. Towner, dec'd, pl'ff,
"*against*
"CHARLES W. LUCAS, EXECUTOR OF ED-
"ward Lucas, dec'd, defendant. } In debt. Judgement on sci. facias.

28 "Judgement at a term of the circuit court of Jefferson County, commencing the 20th of May, 1857, for $2,000.00 debt, with interest thereon, to be computed at the rate of six per centum per annum, from December 31st, 1841, till paid; $6.55 *cents*, costs of original judgment; and $6.25 *cents* the costs of suing out writ of scire facias to revive judgement.

"THE SAME, PLAINTIFF,
against
"THE SAME, DEFENDANT. } Scire facias to revive judg't.

"Judgement at same term for $2,000.00, debt, with interest thereon at the rate of six per centum per annum from December 31st, 1841, til' paid; $6.55 *c'ts* costs of original judgement; and $6.25 *cents*, the costs of suing out writ of scire facias to revive judgement. [over.]

"THE SAME, PLAINTIFF,
against
"THE SAME, DEFENDANT. } Scire facias to revive judg't.

"Judgement at the same term for $2,169.21 *cents* debt, with 6 per cent. interest thereon from December 31st, 1841, til' paid; $6.55 *c'ts* costs

of original judgement; and $6.25 *c'ts*, the costs of sueing out writ of scire facias to revive judgement.

"Copies. Teste:

29 "ROBERT T. BROWN, *Clerk.*"

And your orator saith that no part of said judgements has been paid; and he charges that the said three original judgements are liens on the lands so sold to said Robert A. Lucas, and on any other land of which said Edward Lucas was seized and possessed at the date of them, severally.

And your orator saith that the said Edward Lucas left a number of children and grandchildren, viz: his sons Lewis Lucas, Edward Lucas, Robert A. Lucas, Benjamin Lucas, John Lucas, and Charles W. Lucas; and the following children of his deceased daughter Elizabeth, who had married William McMurran, viz: George W. McMurran, Edward P. McMurran, Elizabeth McMurran, and Margaret, married to Francis Shepherd; and the children of George Lucas, a deceased son of Edward Lucas, who reside in Missouri, and whose names are unknown to your orator.

Inasmuch, therefore, as your orator is remidiless in the premises, save in a court of equity, he prays that the said Charles W. Lucas,

30 executor of Edward Lucas, deceased, and in his own right; and Frances Lucas, the widow; and Lewis Lucas, Edw'd Lucas, Robert A. Lucas, Benjamin Lucas, and John Lucas, George W. McMurran, Edward P. McMurran, Elizabeth McMurran, and Francis Shepherd and Margaret, his wife, late Margaret McMurran, and the children of said George Lucas, deceased, whose names are unknown to your orator, may be made defendants, and may answer; that an account may be had of the personal estate, and that the said judgements may be satisfied to your orator, under decree of this honorable court; and that your orator may have such other relief in the premises as to your honor may seem just and equitable.

May it please your honor to grant to your orator the Commonwealth's writ of subpœna, &c.

EDW'D E. COOKE,
Counsel for Plaintiff.

1858. MARCH RULES "ALSO."—Order of publication against the defendants, George W. McMurran, Edward P. McMurran, & Elizabeth McMurran, & the children of George Lucas, dec'd.

1858. APRIL RULES.—Process executed against the home de-

31 fendants, Cha's Lucas, Frances Lucas, widow, Lewis Lucas, Rob't A. Lucas, Benj. Lucas, John Lucas, Frances Shepherd & Margaret, his wife, and decree nisi against them; & cont'd on publication as to the non-resident defendents.

1858. MAY RULES.—Bill taken for confessed as to the resident def'ts, and cause set for hearing as to all the defendants.

1858. MAY TERM.—On motion, Robert A. Lucas, one of the defendants in this suit, this day filed his answer, as follows:

To the judge of the circuit court for Jefferson County, Virginia:

The seperate answer of Robert A. Lucas to the bill, exhibits in the said court by Thomas H. Towner, administrator of Benjamin T. Towner, against this respondent, and others.

This respondent, reserving all right of exception to said bill, for answer thereto, or to so much thereof as he is advised it is material for him to answer unto, says: That he believes it is true that the judgements were obtained by B. T. Towner against Edward Lucas, and he is the
32 present owner by purchase of the land referred to in the bill, for which he holds a deed executed by said Edward Lucas and his wife; that said Edward Lucas has since died, and his widow is still living. Your orator is advised that whatever lien the pl'ff may have on such land it is to be postponed to the widow's claim for dower, which he now owns by virtue of her deed.

This respondent further shews that, to enable him to make said purchase, he borrowed from R. D. Shepherd, of Jefferson County, $9,000, and secured the repayment of the loan by a deed of trust on the land in which E. I. Lee is trustee; that the same land was, at the time, subject to older liens, both judgements and deeds of trust, prior to the judgements of said B. T. Towner; that of the money so borrowed about $8,900 was expended in the payment of said judgements and other liens, taking assignments of the same, which are now held by said R. D. Shepherd as further security for said loan, so that, as your respondent is advised, the liens of said R. D. Shepherd are entitled to be preferred to any the plaintiffs may have. Your respondent further states that said assignments are in the possession of said R. D. Shepherd, who is
33 not now in the Commonwealth of Virginia.

And your respondent as advised that, before further proceedings can be properly had in this suit, said R. D. Shepherd ought to be made a party thereto.

E. I. LEE,
For Def't R. A. Lucas.

VIRGINIA, *Jefferson County, set:*

Robert A. Lucas makes oath before me, a notary public for the county aforesaid, that he believes that facts set forth in the praying answer were true.

Given under my hand this 27 day of May, 1858.

CHARLES HARPER, *N. P.*

1858. OCTOBER TERM.—On the motion of the plaintiff, Thomas A. Moore is appointed guardian ad litem for the infant defendant, Elizabeth McMurran, who thereupon filed an answer in behalf of said infant "as follows:"

The answer of Elizabeth McMurran, an infant defendant, to the bill of complainant, exhibited in the circuit court for Jefferson County, Virginia, by Benj. T. Towner, adm'r, ag't Robert A. Lucas & others, defendants.

34 This defendant, answering, says that she knows nothing of the matters stated in the bill, but being an infant, submits her rights to the protection of the court.

THO'S A. MOORE,
Guard'n ad litem.

And this cause coming on to be heard upon the bill & exhibits, answer of the defendant R. A. Lucas, filed at the last term, order of publication against the non-resident defendants, duly executed, and more than one month having since elapsed; and, on the answer of the infant defendant, Elizabeth McMurran, was argued by counsel. Upon consideration whereof, it is decreed and ordered, that a commissioner of this court do settle the account of Charles W. Lucas, as ex'or of Edw'd

Lucas, dec'd, and that the said commissioner do ascertain & report of what real estate Edward Lucas, sen'r, dec'd, died seized, its value and ann'al value; also, the liens against the same, their nature, dates, and priorities, making any special statements, deemed pertinent by himself, or which may be required by either of the parties; and the said commissioner is directed to give notice to the parties, by publication
35 in some newspaper printed in the county of Jefferson, once a week, for four successive weeks, which publication shall be in lieu of personal service of notice of the time and place of executing this order.

1859. APRIL 19TH.—Commissioner's report filed as follows:

Pursuant to the annexed decree, I gave notice to the parties, by publication, four weeks next before the 29th of January, 1859, in the Virginia Free Press, a newspaper published in Charlestown, Jefferson County, Virginia, that I should proceed on that day to execute said decree.

Charles W. Lucas, executor of Edward Lucas, deceased, made oath before me that no assetts of his testator had come to his hands, the personal property of the decedent having been levied on, by execution, in his life-time, and sold under the same.

I have stated the debts of Edward Lucas as presented before me. The statement will be found on the following pages.

The debts, in the classes 1, 4, and 6, were secured by deeds of
36 trust on the decedent's land.

The other classes were judgement debts. The debts are stated in their order of priority, from 1 to 6, the first number in succession to be paid before succeeding numbers.

On page 4, I have stated an account between Rezin D. Shepherd and Robert A. Lucas, which has some connection with the debts of Edward Lucas, showing how R. D. Shepherd paid for some of them, &c.

I state further that the debt due to B. T. Towner's estate was assigned to Rezin D. Shepherd since the institution of this suit.

I state, on the oaths of George R. Staley & Jno. E. Schley, that the land charged with the debts is worth $70 per acre, and $1,000 per annum as rent.

Resp'y reported.

EDW'D E. COOKE, *Com.*

AP'L 9, 1859.

Debts of Edw'd Lucas, sen'r, audited.

CLASS 1.

To Rezin D. Shepherd, ass'ee of R. A. Lucas, ass'ee of R. Douglass, secured by deed of trust of 27th July, 1843, 2 bonds, one for		$2,502 00	
37 Endorsed interest paid to Ap'l 6, '44. Int. from Ap'l 6, '44, to July 30, '44		$47 53	
		2,549 53	
1844. July 30. Credit endorsed on bond		1,712 00	
Endorsed int. pa' to Sept. 6, '47		837 53	
Int. fro' Sept. 6, '47 to Mar. 1, '59		576 91	
			$1,414 44
The other bond for		$2,500 00	
Endors'd int. p'd to Ap'l 6, '47. Int. from Ap'l 6, '47 to Mar. 1, '59		1,784 58	
			4,284 58
			$5,699 02

CLASS 2.

Am't bro't			5,699 02
To Rezin D. Shepherd, ass'ee of Rob't A. Lucas, ass'ee of John L. Mayer, judgement of late superior court for Jefferson County, at May term, 1844, in name of John L. Mayor, &c., vs. Edward Lucas, $5,463.15, as surety for Geo. Reynolds, to be discharged by		$2,731 57	
Int. fro' June 22, 1840, to Feb'y 22,'45		764 83	
		3,496 40	
1845. Feb'y 22. Credit am't paid	780 35		
Sheriff's coms. off	24 60		
		755 75	
		$2,740 65	
Int. on $2,731 57 fro. Feb'y 22,'45 to May 13,'47		364 65	
		$3,105 30	
1847. May 13. Cred. am't paid, $600, less sh'ff's coms		588 00	
		$2,517 30	
1847. May 13. Int. fro. Mar. 1, 1859		1,781 38	
Costs		8 39	
			4,307 07

CLASS 2.

To Benj. T. Towner's adm'r, use R. D. Shepherd, judgement of late sup'r court for Jefferson County, at May term, 1844, vs. Edw'd Lucas, for	$2,000 00	
Int. fro. Dec. 31,'41, to Mar. 1,'59	2,060 33	
Costs	6 55	
		4,066 88
		$14,072 97

CLASS 3.

To same pl'f, use of R. D. Shepherd, judg't of same court, at May term, 1845, for	$2,000 00	
Int. fro' Dec. 31, 1841, to Mar. 1st, 1859	2,060 33	
Costs	6 55	
		4,066 88

CLASS 4.

To Rezin D. Shepherd, ass'ee of Rob't A. Lucas, secured by deed of trust, Aug'st 8th, 1845, debt to Valley Bank, paid by R. A. Lucas as endorser	$1,500 00	
Int. fro' Jan'y 26th, 1849, to Mar. 1, 1859	908 25	
		2,408 25

CLASS 5.

To Benj. T. Towner's adm'r, use of R. D. Shepherd; judg't of late sup'r court of Jefferson County, at May term, 1846, for	$2,169 21	
Int. fro' Dec'r 31, 1841, to Mar. 1st, 1859	2,234 64	
Costs	6 55	
		4,410 40

39

CLASS 6.

To R. D. Shepherd, ass'ee of R. A. Lucas, ass'ee of Peter Sauerwein. Deed of trust admitted to record, July 19, 1847. 3 bonds, each for $262.22, is	$786 66	
Int. fro' Feb'y 11th, 1847, to Mar. 1,'59	568 75	
		1,355 41
		$26,313 91

Further statement next page.

Statement between Robert A. Lucas and Rezin D. Shepherd.

Robert A. Lucas to Rezin D. Shepherd, two bonds secured by deed of trust on the land purchased by R. A. Lucas of Edw'd Lucas, which was incumbered by the liens hereinbefore stated, the deed dated Oct. 16th, 1848; one of the bonds for	$7,300 00	
Interest fro' Jan'y 1, '49, to Mar. 1, '59.....	4,453 00	
		11,753 00
The other bond for	1,700 00	
Int. fro' Sept. 27, '48, to Mar. 1, '59.....	1,063 06	
		2,763 06
		$14,516 06
Deduct debts assigned by R. A. Lucas:		
The Douglass debt on page 2	$5,699 02	
" Jno. L Mayor debt " "	4,307 07	
" B'uk Valley " " 3	2,408 25	
" Sauerwein " " 3	1,355 41	
		13,769 75
Balance due fro' R. A. Lucas to R. D. S'pherd on 1st March, 1859.		$746 31

40 1859. MAY TERM.—Commissioner Cooke having made his report in this case, which was returned on the 19th day of April last, to which there is no exception, and this cause coming on again to be heard, this 24th day of May, 1859, upon the papers formerly read, and said report was argued by counsel. Upon consideration whereof it is decreed and ordered that Edmund I. Lee, the trustee in the deed of trust from Rob't A. Lucas, for the benefit of R. D. Shepherd, and who is hereby appointed a special commissioner for the purpose, do, after advertising the time, place, and terms of sale, in such newspapers as he may select, published in Jefferson and Berkeley counties, for one month, proceed to sell the land conveyed by that deed, at public auction, upon the following terms, viz, one-third cash, the balance in equal annual instalments of one & two years, to bear interest from the day of sale, the deferred payments to be secured by a deed of trust on the property sold. But the said commissioner shall not receive any money under this decree until he shall have executed a bond with good security in a penalty of
41 $10,000 conditioned for the faithful discharge of his duty as such commissioner.

1859. OCTOBER TERM.—The commissioner, and trustee, E. I. Lee, having made his report of the sale of Robert A. Lucas' land, in pursuance of the decree of the last term, as follows: The undersigned commissioner respectfully reports to the judge of the circuit court for Jefferson County, Virginia, that, in pursuance of the decree of the court in this case, having first advertised the time, place, and terms of sale, as directed by the decree, in the Shepherdstown Register, Charlestown Free Press, and Martinsburg Republican, he sold the land of Robert A. Lucas at public auction, to Rezin D. Shepherd, at the price of $80 per acre; that he caused the same to be surveyed by the surveyor of the county, who reports the tract to contain 293 acres 29 poles, which, at $80 per acre, amounted to $23,459.00, which, not being sufficient to pay the amount reported to be due Mr. Shepherd he was only required to pay a sufficient amount to cover the expenses of the sale, which he has done, viz:

Cryer	$5 00
Advertizing:	
42 Shepherdstown Register.....	$7 00
Martinsburg Republican.....	6 12½

Ch'stown Free Press	6 12½
Survey	12 00
Deed	5 00
Com'ns on $300, at 5 p'r c't	15 00
" on 23,159, at 2 p'r c't	463 19
	519 44

Which, deducted from $23,459, will leave $22,939.56 applicable to the debts due the purchaser.

E. I. LEE, *Commissioner.*

OCT. 20TH, 1859.

Which, being examined by the court, is confirmed, and the said commissioner is directed to convey the property sold to the purchaser; and this cause is recommitted to Commissioner Cooke, to ascertain and report forthwith *with* amount will still be due to R. D. Shepherd after applying the net proceeds of sale *to the court* of this suit, and to the debts due to him, as heretofore audited.

1859. NOVEMBER TERM, ALSO.—Comm'r Cooke made his report in pursuance of the decree of this term, as follows:

Pursuant to the annexed decree, I have made a statement, herewith returned, showing the balance due from Edward Lucas' estate to
43 Rezin D. Shepherd, after crediting the nett proceeds of the sale made by E. I. Lee, $2,440.73, with int. on $2,169.21, part thereof, fro' Aug. 6, '59, 'til paid; and also unpaid, the debt, class No. 6, $1,355.41, with interest on $786.66, from March 1st, 1859, till paid.

I further report that, in the report of Com'r Cooke, of April 9, 1859, there is a statement of accounts connected with these debts between Robert A. Lucas and Rezin D. Shepherd, showing a balance due from said Lucas to said Shepherd of $746.31, after giving credit to said Lucas for the said debt, class No. 6, viz, $1,355.41; but as that debt has not been paid by the said sale, the said Lucas is still responsible to said Shepherd for that amount, and the account will stand thus:

R. A. Lucas, dr., to him with interest from March 1, 1859	$746 31
And the debt No. 6, with interest on $786.66, from same
44 day	1,355 41

EDW'D E. COOKE, *Com'r.*

CHARLESTOWN, *Nov'r*, 1859.

Am't of debts of classes No. 1, 2, 3, 4, and 5, due from Edward Lucas to Rezin D. Shepherd, taken from Com'r Cooke's report in this cause, dated April 9th, 1859		$24,958 00
Int. on $13,524.04 fro' March 1st, 1859, to Aug. 6, 1859		349 37
		$25,307 87
Deduct net proceeds of sale made by E. I. Lee, as per his report of Oct. 20, 1859	$22,939 56	
From which deduct costs suit, as taxed b' clerk, &c	72 42	
		$22,867 14
Balance unpaid of said debts		$2,440 73

The above balance to be considered as a balance of the 5th class debt, in said report, which was a judgment of the late circuit superior court for Jefferson County, in the name of Benjamin T. Towners, adm'r, for the use of Rezin D. Shepherd, for $2,169.21, which bore interest from Dec'r 31, 1841, and for $6.55 costs.

The above balance is still due, with interest on $2,169.21, part thereof, from August 6th, 1859, 'til paid.

This leaves the debt, class No. 6, in said report still unpaid, being
45 $1,355.41, with interest on $786.66, part thereof, from March 1st, 1859, to which there is no exception. And this cause coming on to be heard again, this 4th day of November, 1859, upon the papers heretofore read, & said report was argued by counsel, upon consideration whereof, the court confirming said last-mentioned report, decrees and orders that Charles W. Lucas, executor of Edward Lucas, dec'd, do, out of the assetts of said Edward Lucas' estate, in his hands to be administered, or which may hereafter come into his hands, pay to Rezin D. Shepherd, assignee of the plaintiff, the sum of $2,440.73, with interest on $2,169.21, part thereof, from the sixth day of August, 1859, till paid; and that Robert A. Lucas pay to the said R. D. Shepherd $2,101.72, with interest on $1,532.97, from the 1st day of March, 1859, 'til paid.

WEST VIRGINIA, *Jefferson County, ss:*

CLERK'S OFFICE, *July 7th*, 1870.

I, W'm A. Chapline, clerk of the circuit court for said county & State, do hereby certify that the foregoing are true copies taken from
46 the records in my office.

Witness my hand and the seal of the circuit court on the day and year first above written.

{ CIRCUIT COURT JEFFERSON COUNTY SEAL, WEST VA. }

W. A. CHAPLINE,
Clerk of the Circuit Court of Jefferson County.

Also a deed from Edmund I. Lee, commissioner appointed by said court, in the cause aforesaid, conveying said land to R. D. Shepherd, in the words and figures following:

47 *E. I. Lee, com'r, to R. D. Shepherd.—Deed of bargain and sale.—(Marked "2.")*

This deed, made the 24th day of October, in the year 1859, between Edmund I. Lee, a special commissioner, appointed by a decree of the circuit court of Jefferson County, Virginia, in a suit depending in said court, wherein Benjamin T. Towner's administrator was plaintiff, and Robert A. Lucas & others were defendants, of the first part, and Rezin D. Shepherd, of the county of Jefferson, & State of Virginia, of the second part, witnesseth that, whereas in pursuance of said decree, the said Edmund I. Lee, commissioner as aforesaid, after advertising the time, place, & terms of sale for one month, did offer, on the day of , in the year 1859, for sale at public auction, the land conveyed by a deed of trust from Robert A. Lucas, for the benefit of R. D. Shep-
48 herd, in which said deed the said Lee was trustee, (which said land is hereafter more particularly described,) and whereas at said sale the said Rezin D. Shepherd became the purchaser, he being the highest bidder, to wit, for the sum of eighty dollars per acre, therefore,

the said Edmund I. Lee, commissioner, in pursuance of said decree, and by direction of another decree in the same case, made at October term, 1859, of said court, in consideration of the sum of twenty-three thousand four hundred and sixty dollars ($23,460.00) in cash or its equivalent, has granted to the said Rezin D. Shepherd all that tract of land lying in the county of Jefferson, Va., formerly the property of Capt. Edward Lucas, dec'd, and more particularly described in the plat hereto annexed, containing two hundred and ninety-three and one-fourth (293¼) acres, with all the appurtenances, rights, &c., thereto belonging: To have and to hold to his, the said Shepherd's, only proper use and behoof forever.

E. I. LEE, *Com.* [SEAL.]

STATE OF VIRGINIA,
County of Jefferson, sct:

CLERK'S OFFICE OF THE COUNTY COURT.

49 On this 3rd day of Nov'r, 1859, the foregoing deed is acknowledged before me in the said office, by Edmund I. Lee, & admitted to record.

Teste: T. A. MOORE, *Clerk.*

This deed, marked "2." Also the will of R. D. Shepherd, in the words and figures following:

50 *Will R. D. Shepherd.—(Marked 3.)*

I, Rezin Davis Shepherd, of Jefferson County, in the State of Virginia, make and publish this my last will, revoking all others:

First. Having given property and money at different times to my family connections, the greater part of which stands charged on my books under the head of an account there opened and called "Family accounts," I will and bequeath to each therein named, whatever may have been so given and charged, or anything that I may hereafter give during my life-time.

Second. I will and bequeath to my daughter, Ellen Brooks, and her two sons, Peter C. Brooks, the younger of that name, and Shepherd Brooks, all of Medford, in the county of Middlesex, and State of Massachusetts, all my property, real, personal, & mixed, and wherever it may be found, giving one-third to each; and I direct that they be put into possession of it without delay.

Third. I constitute and appoint my two grandsons, Peter C. Brooks, the younger of that name, and Shepherd Brooks, executors of this, my will, giving them seizen of my entire estate; and I direct that they be fully authorized to act as such without being obliged to give se-
51 curity of any kind; and in case of death or absen*s*ence or inability to act of either of them, I hereby empower the other to act alone, in carrying out the provisions of this, my last will and testament, which I declare to be written entirely in my own handwriting and is my olographic will.

This done on my farm in the county of Jefferson, in the State of Virginia, on the first day of September, in the year of our Lord one thousand eight hundred & fifty-nine. (1st September, 1859.)

R. D. SHEPHERD.

In the recorder's court.

STATE OF WEST VIRGINIA,
Jefferson County, set:

Be it remembered that, on this, the twelfth day of March, in the year of our Lord eighteen hundred and sixty-six, the last will and testament of Rezin Davis Shepherd, late of Jefferson County, in the State of West Virginia, purporting to be in his own handwriting, and without witnesses, was presented to the recorder's court for the county and State aforesaid, by Peter C. Brooks, junior, and Shepherd Brooks, the executors named in said will, and the handwriting of the body of said will, as well as the signature thereto, was proved upon the oaths of
52 James H Shepherd, James D. Fayman, and William A. Chapline, competent witnesses, and acquainted with the signature of said testator, to be in the proper handwriting of the said Rezin Davis Shepherd, and thereupon said will was by said court admitted to be recorded among the records of said court; and thereupon P. C. Brooks, junior, and Shepherd Brooks, the executors named in said will, made oath in due form of law, that the property of said deceased, real, personal, and mixed, and wherever found, does not exceed the value of fourteen hundred and sixty thousand dollars, for which amount United States internal revenue stamps have been duly affixed hereto by the executors aforesaid, and by been cancelled.

And the said Peter C. Brooks, junior, and Shepherd Brooks, executors, named in the will aforesaid, entered into and acknowledged a bond with condition according to law of the State aforesaid, in such cases made and provided, in the penal sum of $2,920,000, and also made oath in due form to administer the estate of said testator.

Wherefore, it is ordered that a copy of this proceeding and
53 admission to probate be given under the seal of this court, with a copy, under seal, of the will aforesaid hereto annexed, to the said executors, such copy to disclose the amount of the affixed and cancelled stamps aforesaid.

[$200. $50. $50. $200. $50. $50. $25. $5. $50. $50. Int. rev. stamps. P. C. B., jr, & S. B. Mar. 12, 1866.]

Teste: GEORGE BYERS, *Recorder.*

54 Also a deed from Ellen Brooks & Shepherd Brooks to the plaintiff Peter C. Brooks, jr., in the words and figures following:

Ellen and Shepherd Brooks to P. C. Brooks, jr., B. & S.—(*Marked* 4.)

This deed made this nineteenth day of May, in the year of our Lord eighteen hundred and sixty-six, between Ellen Brooks and Shepherd Brooks, of the first part, and Peter Chardon Brooks, the younger of that name, of the second part, all of Medford, of the county of Middlesex, and State of Massachusetts, equal & only devises of R. D. Shepherd, deceased, witnesses: That the said parties of the first part, for and in consideration of the sum of twelve thousand dollars, in current money of the United States, to them, the said Ellen and Shepherd Brooks in hand paid by the said Peter C. Brooks, the receipt whereof is hereby acknowledged, do by these presents give, grant, bargain, sell, alien, release, and confirm unto the said party of the second part all their right, title, and interest in and to a tract of land in the county of Jefferson, and State of West Virginia, bounded and described

as follows, to wit: Beginning at a stone, (1,) an original corner, on the east side of the road leading from Charlestown to Shepherdstown, a corner to Adam Link and Selby's heirs; thence, with said heirs and John H. McEndree north seventy eight and one quarter degrees (°) west, one hundred and thirty seven poles and five-tenths of a pole, to a stake (2) in McEndree's line, a corner to Col. Robert Lucas; thence, with his lines south, ten and one-half degrees west, one hundred and sixty-four poles, to a point (3) at or very near the southeast corner of an old still-house; thence south seventy-seven and one-half degrees twenty poles and thirty-five one-hundre'ths of a pole to a large white-oak tree, (4;) thence south ten and one-half degrees west, fifty-two poles and three tenths of a pole, to a stone, (5;) thence south seventy-eight and three-quarter degrees east, thirty-seven poles and two-tenths of a pole, to three walnut trees (6) on a ridge; thence south ten and one-half degrees west, one hundred poles and eight-tenths of a poles, to a stone (7) lying on the place of a corner; thence south seventy-eight and three quarters degrees east, ninety-five poles and six-tenths of a pole, to a stone, (8;) thence south ten degrees west, sixty poles and eight-tenths of a pole, to a stone (9) lying over the place of a corner; thence south seventy-nine and one-half degrees east, four poles and eighty-
56 five one-hundre'ths of a pole, to a large heart cherry-tree, (10;) thence south ten & one quarter degrees west, thirty-nine poles and one-tenth of a pole, to the south side of a locust-post (11) on the side of a hill; & thence finally, with Col. Lucas and with Mrs. Frances Lucas', south seventy-seven degrees east, thirty-six poles and eighty-five one hundre'ths of a pole, to a stone (12) on Mrs. F. Lucas' line and a corner to William and Tobias Hendricks; thence, with the latter and Coffinbarger, north ten and three quarter degrees east, two hundred and eleven poles and five-tenths of a pole, to a stone, (13,) a corner to Coffinbarger, in Adam Link's line; thence, with Link, north eighty-six degrees west, sixty-two poles and sixty-five one hundre'ths of a pole, to a stone, (14,) marked E. L., an original corner, a corner to Link; thence, with Link, north ten and three-quarter degrees east, two hundred and thirteen poles and nine-tenths of a pole, to the beginning: containing two hundred and ninety-three and one-fourth (293¼) acres according to the survey made by John Hess, surveyor of Jefferson County, Aug. 19th, 1859, and all the privileges and appurtenances whatsoever to the said tract of land belonging or in anywise appertaining thereto, being the
57 same tract of land conveyed by E'mund I. Lee, as special commissioner, to Rezen R. Shepherd, by deed recorded with deeds of Jefferson County, book No. 39, page 47:

To have and to hold the said hereby granted premises to him, the said Peter C. Brooks, his heirs, and assigns forever, to his and their only proper use and behoof.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day, month, and year first herein written.

ELLEN BROOKS. [SEAL.]
SHEPHERD BROOKS. [SEAL.]

Signed, sealed, & delivered in presence of—
ROBERT LEVI &
CHA'S B. F. ADAMS.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

On this nineteenth day of May, A. D. eighteen hundred and sixty-six, personally appeared before me, the subscriber, a notary public duly commissioned in and for the county of Suffolk, State of Massachusetts, Ellen Brooks & Shepherd Brooks, whose names are signed to the foregoing written instrument, and they severally acknowledged the same to be their act.

58 Given under my hand and official seal at my office in the city of Boston aforesaid, this nineteenth day of May, A. D. eighteen hundred and sixty-six.

{ SUFFOLK COUNTY, NOTARY PUBLIC, BOSTON, MASS. C. B. F. A. }

CHA'S B. F. ADAMS,
Notary Public.

STATE OF WEST VIRGINIA,
Jefferson County, sct:

RECORDER'S OFFICE.

The foregoing deed of B. & S. was produced, duly executed, stamped, &c., and admitted to record this 28th day of July, 1866.

Teste: GEORGE BYERS, *R. J. C.*, &
JAMES D. FAYMAN, *D. R. J. C.*

WEST V'A, *Jefferson County, ss:*

RECORDER'S OFFICE, *July 19th*, 1870.

I, George W. Chase, recorder of the recorder's court for said county & State, do hereby certify that the foregoing are true copies, taken from the records in my office.

Witness my hand and the seal of the recorder's court on the day and year first above written.

{ RECORDER. JEFFERSON COUNTY, WEST VIRGINIA. }

GEO. W. CHASE,
Recorder of Jefferson County, West V'a.

59 To the admission of which the defendants objected, and the matter being referred to the court said objection was overruled. And the plaintiff further offered in evidence a lease from R. D. Shepherd to the defendant for the premises in controversy, dated August 30th, 1859, in the words and figures following:

R. D. Shepherd to R. A. Lucas.—Lease.—(Marked "5.")

Memorandum of a contract and agreement made this 30th day of August, 1859, between R. D. Shepherd and Robert A. Lucas, both of Jefferson County, Virginia.

Whereas at a public sale made by E. I. Lee, as trustee and commissioner, on the 6th day of August, 1859, said R. D. Shepherd became the purchaser of the tract of land in said county of Jefferson belonging to said Robert A. Lucas, and upon which he now resides, containing by a recent survey thereof about 293 acres:

It is agreed that said Robert A. Lucas shall continue on said land as tenant of said R. D. Shepherd until the first day of April, 1861,
60 yielding and paying to said R. D. Shepherd, his heirs, exec., adm'rs, or assigns, as rent therefor, two-fifths of the present growing crop of corn and two-fifths of all future crops to be raised on

said land: The corn to be crib'ed on the land and due notice thereof to be given to said R. D. Shepherd; and the other rent to be delivered in due season either in Shepherdstown or Duffield's depot, or such othe' place not more remote as said R. D. Shepherd, his heirs, exec's, adm'rs, or assigns may direct and appoint.

And the said R. A. Lucas, for himself and his heirs, covenants to and with the said R. D. Shepherd, his heirs, exec'rs, &c., that he will cultivate said land in a judicious and farmer-like manner, and with a view to its improvement; that not more than two-fifths of the cleared land shall be cultivated in any one year, viz, about one-fifth as fallow and one-fifth in corn; that upon which small grain is sown to have clover-seed sown on it, at the rate of one bushel to eight acres, the clover to remain two years before it is turned under, and not to be pas-
61 tured too close; the small grain to be threshed on the land; the straw not to be hauled off the land, but to be converted into manure and to be distributed in a farmer-like manner; the clover to be plastered at the rate of a bushel of plaster to an acre; that he, the said Robert A. Lucas, shall keep the fences in good order and repair, and so deliver up the premises at the expiration of the lease, the rails or other material thereof to be procured from the timber land on the demised premises, using only such trees as are dead or decaying unless otherwise authorized by said R. D. Shepherd.

To the faithful performance of all which the said Robert A. Lucas hereby binds himself & his heirs. Witness the hands and seals as well of the said R. D. Shepherd as the said Robert A. Lucas, the day first written.

R. D. SHEPHERD. [SEAL.]
R. A. LUCAS. [SEAL.]

By consent of parties to this lease it is agreed that the rent for the within-mentioned land instead of the portion of the crops as therein named, shall be a monied rent, to wit, eight hundred and thirty-
62 three dollars and thirty-three cents, to be paid on the 30th day of June, 1860, and the like sum on the 30th day of March, 1861. The other terms of the lease remaining unaltered. Witness the signatures and seals of the parties this 2d day of December, 1859.

R. A. LUCAS. [SEAL.]
R. D. SHEPHERD. [SEAL.]

The plaintiff then offered evidence tending to prove that the defendant occupied the premises in controversy from said 30th of August, 1859, until the institution of this suit, and still remain in possession thereof, until the present time, and that the defendant's wife had paid the rent falling due January 1867 and 1868, and that he, the said dofendant, had refused to pay rent since.

The plaintiff then offered in evidence a notice of the plaintiff to the defendant bearing date 15th of February, 1859, after having first proved due service of the same, in the words and figures following:

Notice.—(*Marked* "6.")

To Robert A. Lucas and Catherine S. Lucas, his wife:

63 In accordance with the terms and provisions of the lease under which you now hold and occupy a tract of land in the county of Jefferson, State of West Virginia, belonging to me, and which lease provides that you shall receive one year's notice in advance "if the rent

should be increased, or any other change" made in the property: This is to give you notice that I hereby terminate, on the first day of April, 1870, the lease under which you now hold and occupy said land; and I require you to surrender to me quiet and peaceable possession of said tract of land on the said first day of April, eighteen hundred and seventy.

PETER C. BROOKS, JR.

FEBRUARY 15th, 1869.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

COMMISSIONER OF STATE OF WEST VIRGINIA. MASSACHUSETTS. C. B. F. A.

I, Charles B. F. Adams, a commissioner appointed by the gove'nor of the State of West Virginia, for the said State of Massachusetts do hereby certify that Peter C. Brooks, jr., whose name is signed to the foregoing writing, bearing date on the 15th day of February, A. D. eighteen hundred and sixty-nine, has acknowledged the same before me in my State, aforesaid.

64 Given under my hand this fifteenth day of February, A. D. eighteen hundred and sixty-nine.

CHA'S B. F. ADAMS,
Com'r of the State of West Virginia.

Service.

Executed the within notice by delivering a true copy of the same to each of the within-named parties, Robert A. Lucas, and Catharine S. Lucas, his wife, this 9th day of March, 1869.

J. THO'S CHAPLINE,
Deputy for
T. W. POTTERFIELD,
Sheriff.

And the plaintiff here rested his case.

The defendant, to support the issue on his part, offered in evidence the letter of P. C. Brooks, jr., and Shepherd Brooks, to Mrs. Catherine A. Lucas, dated November 29th, 1865, and her reply to them, dated December 11th, 1865, in the words and figures following:

Letter & reply.—(*Marked* "7.")

BOSTON, MASS., *Nov.* 29, 1865.

DEAR MADAM: As executors of the estate of Mr. R. D. Shepherd, we address you regarding the disposition of the farm belonging to
65 him, on which you live. We have two propositions to make to you, either of which you can accept:

First. To occupy the place, and pay therefor to us, or our agent, the yearly rent of six hundred dollars, ($600,) on the first day of December of each year, the lease to begin January 1st, 1866. If the rent should be increased, or any other change made, you are to receive one year's notice of it in advance. You are to make all repairs, and to pay all expenses on the property except taxes, not allowing it to deteri'ate.

Second. The place to be sold as soon as convenient, to be paid for—one-half in cash, to come to us; the other half to remain on mortgage, which will be put in trust for your benefit during your life, and go to your

children outright at your death. Meanwhile, until the sale, and as long as you occupy the place, we expect you to pay rent at the rate of $600 per annum, beginning January 1st, 1866. We advise the selection of the second proposition, as being the best for all parties conserned, because if you choose the first, and then fail to perform your part of the contract, which, judging from past experience, may be the case, we do not bind ourselves to carry out the second proposition, and the property would probably be sold on terms much less advantageous to you.

66 This matter should be considered well by you before answering. Please inform us when fully decided, which proposition you prefer to take, and repeat it in writing. You will understand that this communication being purely on business affairs, is expressed in a business manner, and not intended to be otherwise than.

Yours, very truly,

P C. BROOKS, JR.
SHEPHERD BROOKS.

To Mrs. CATHARINE A. LUCAS,
Shepherdstown, Virginia.

Reply.—(*Marked* "8.")

JEFFERSON CO., VIRGINIA,
Elmwood, December 11th, 1865.

Messers. P. C. & S. BROOKS.

DEAR SIRS: Your letter of Nov. 29th was received the 2nd inst. I have concluded to accept of your first proposition, that is, to rent this farm at six hundred dollars ($600) a year. As all property is rented here the 1st of April, I wish to make one request, which is to change the date. The rent to be paid the 1st of January; the lease to begin the 1st of April. My reason for making this request is in case I

67 should be requered to leave the farm, I would then have time to find another home.

Yours, respectfully,

CATHERINE S. LUCAS.

And in connection with said letters, it was agreed by counsel, that the modification of the terms of the lease proposed by Catherine A. Lucas, as to the time when the lease should commence and when the rent should be paid were accepted by the said Peter C. Brooks & Shepherd Brooks, ex'or', &c.

The defendant then offered in evidence the letter of Catharine Lucas, bearing date Feb'y 12th, 1861, and the memorandum annexed of the said Catherine, dated Feb'y 12th, 1861, and the reply of R. D. Shepherd, bearing date February 17, 1861, in the words and figures following:

Letter of C. Lucas.—(*Marked* "*X Y.*")

FEB. 12TH, 1861.

DEAR UNCLE: I enclose you an agreement, which I must confess is not drawn up in a very lawyer-like manner, yet will answer the purpose, I hope.

We have already hauled thirty thousand brick for the building, which Grant says will not be sufficient. I shall be obliged to have ten

68 thousand more. Mr. Barnhart & Grant were out yesterday to

look at the situation, & we find it will be necessary to move the meat-house. Mr. Barnhart & James will be out in a few days to stake off the foundation, which our hands are to dig. I told Mr. Barnhart, as there was not much probability of Virginia seceding it would be advisable to build free-State style, very convenient. Ere many years I expect to be living as they do in Barnstable, doing all my own work & eating in the kitchen, &c. Should we ever have civil war, and some think it inevitable, I intend going as fast as steam can carry me, & seek refuge at Cape Cod.

We have not sold our wheat yet; have just one thousand bushels for sale. I told the workmen it would not be in my power to pay them any money till after harvest. My expenses were more than usual this year, as I was obliged to send Bettie to school, which cost me three hundred dollars; by the time I pay all my liabilities, I am afraid I shall not have much left. When I last heard from the Neck our relations were all well. Uncle Henry has a pet fox which he intends running
69 soon, & says he knows exactly the course it will take.

I am very much engaged this morning preparing my hot-bed, which prevents me imposing longer on your time & patience.

I remain your attached niece,

KATE LUCAS.

Memo.

ELMWOOD, *Feb. 12th*, 1861.

This is to certify that I have rented & taken from R. D. Shepherd, s'r, his farm known as Elmwood, in the County of Jefferson, State of Virginia, for the term of one year, to commence the first day of April next, 1861, at the yearly rent of nine hundred dollars.

CATHERINE LUCAS.

Letter of R. D. Shepherd.

BALTIMORE, 17 *Feb'y*, 1861.

DEAR CATHERINE: Your letter of the 12th inst. came duly to hand. The agreement you sent is all that is necessary; had a lawyer drawn it, he would have occupied two full pages with ridiculous repetitions and technical phrases. I hope you will get on with your improvements without much embarras'ment or trouble. I know that it is not
70 only a serious but a dangerous matter for a farmer to make improvement, especially if he goes on credit; in short, whenever a farmer gets in debt he rarely if ever gets out of it, and may be considered as the greatest stone on his place; therefore they one and all should abhor debt quite as much as they do the d——l.

Where are you sending your daughter to school? Three hundred dollars is just three times as much as it ought to cost. I suppose you are giving her what is called the accomplishments—music, drawing, dancing, and all that kind of nonsense; admirably calculated to make her good for nothing and discontented. A farmer's daughter should be taught to read & write, and do all kind of housework, and to wait on herself.

Truly yours,

R. D. SHEPHERD.

And thereupon the defendant offered the deposition of Catherine Lucas, the wife of the said defendant, in the words and figures following:

Deposition of Catherine Lucas.

CATHARINE S. LUCAS, a witness of lawful age, being first duly
71 sworn, deposes and says:

Ques. State where you reside; whether you are married. If so, how long have you been married?

Ans. Two and half miles from Shepherdstown, in Jefferson County; have been married since the 11th day of November, 1840.

Ques. State who you were before marriage; who was your father; who your uncles; who your aunts on your father's side?

Ans. I was Catharine A. Shepherd before marriage. Abraham Shepherd was my father. My uncles were R. D. Shepherd, James H. Shepherd, Henry Shepherd, & Moses Shepherd. My aunts were Mrs. Ann Hamond and Mrs. Eliza Lee.

Ques. State when and where your uncle James H. Shepherd died?

Ans. He died in New Orleans, in July, 1837.

Ques. State where your uncle R. D. Shepherd lived and died?

Ans. He lived in New Orleans; moved from there to Boston, about 1814; then to Baltimore about 1834; then to New Orleans again in the fall of 1837. He then passed his summers here in Jefferson County, and his winters in New Orleans generally. He died here in Jefferson County, on his Wild Goose farm, on 11th of November, 1865.

72 Ques. State where your grandmother, Mrs. Elenor Shepherd, lived and died, and about what time?

Ans. She lived with my uncle Henry Shepherd, four miles north of Shepherdstown, in this (Jefferson) County, W. Va., in part of his house, and died in September, 1853.

Ques. State when Henry Shepherd died, and how many children did he leave.

Ans. He died in October, 1869; left four children—three sons and one daughter.

Ques. State how many brothers and sisters you have?

Ans. I have four brothers and two sisters.

Ques. State the circumstances connected with the sale of the farm of Edward Lucas, in the declaration mentioned, in 1848, for fifteen thousand dollars.

Ans. My uncle R. D. Shepherd sent for me by my uncle Henry Shepherd, on the day of Mr. Archie Robinson's sale. He said he was now ready to do something for me, and he wished to see me as soon as possible. I went up in a few days to see him at my grandmother's house. He beckoned to me to go in his room. He then told me he heard my husband and John Lucas were farming
73 in partnership, and that he did not approve of it; that he had sent for me to tell me that he was now ready to buy me a home, and that if my father-in-law would sell his farm for $15,000, cash, he would give me the money; and he said, "Why, you look surprised; you need not be; the truth is I owe you." And I told him, then, my father-in-law would not take fifteen thousand for his farm; that he had been offered twenty-five thousand for it. "You go home and see what you can do in the matter, and come back and let me know"—whether he would take the $15,000. He did not believe any land was worth more than $50 per acre, and that, as it was to be kept in the family, he thought they ought to let it go for that; that he would be very sorry to see it go out of the family, and, recollect, that he was doing this for me and my children. He told me not to mention it to my father that he *he* said he owed me; that I should keep that to myself; and I did. I

came home, and John Lucas negotiated with father for the sale of it, (I mean father Lucas.) After two or three days father (Lucas)
74 agreed to take the $15,000, as it was for me and my children. I went up to see my uncle, and told him father (Lucas) said he would take the $15,000. I found my uncle in his garden at the "Wild-Goose Place." After I told him that *that* father (Lucas) had agreed to take the $15,000, he invited me to go down with him and dine at grandmother's. I told him I had seen a carriage-full of persons going there. He insisted upon me going there to get my dinner. I told him I believed I would go home; that I did not feel hungry. "Oh," said he, "you have a home now, and you are too full to eat—to' much pleased. Well, come, go up into my orchard, and eat some of my nice peaches." When he gave me the peaches he was standing by me, with his hand on the horse's mane. I told him I could not find words to thank him for his great kindness to me. "Oh," said he, "don't say anything about it. I should have done this for you long ago." Tears were streaming down his cheek; and he told me all he wanted to know was that I was happy and contented. He said he never could bear the idea of my living on a rented farm.

75 EXCEPTION.—(Counsel for the plaintiff repeats his exception to all testimony given by the parties to any conversations or transactions with Rezin D. Shepherd, dec'd.)

Ques. Your father says that he revokes a certain legacy given to you in his will for reasons satisfactory to you. State what those reasons were, and why you were not given anything in said will.

EXCEPTION.—(Question excepted to.)

Ans. Because I had been provided for by my uncle, R. D. Shepherd. He had given me the $15,000 to buy the farm with.

Ques. Look at the paper, marked "A," and say whether that paper was left with you at or about the time of its date. If so, by whom, and in whose handwriting is it?

(Which paper, marked "A," is in the words and figures following:)

To Robert A. Lucas, and Catherine S. Lucas, his wife:

In accordance with the terms & provisions of the lease under which you now hold and occupy a tract of land in the county of Jefferson, State of West Virginia, belonging to me, and which lease provides that you shall receive one year's notice, in advance, "if the
76 rent should be increased, or any other change" made in the property, this is to give you notice that I hereby terminate, on the first day of April, 1870, the lease under which you now hold and occupy said land; and I require you to surrender to me quiet and peaceable possession of said tract of land on the said first day of April, eighteen hundred & seventy.

P. C. BROOKS, JR.

FEBRUARY 15TH, 1869.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

COMMISSIONER OF STATE OF WEST VA., MASSACHUSETTS. (C. B. F. A.)

I, Charles B. F. Adams, a commissioner appointed by the governor of the State of West Virginia for the said State of Massachusetts, do hereby certify that Peter C. Brooks, jr., whose name*d* is signed to the foregoing writing, bearing date on the fifteenth day of February, A. D. eighteen hundred and sixty-nine, has acknowledged the same before me, in my State aforesaid.

Given under my hand this fifteenth day of February, A. D. eighteen hundred and sixty-nine.

CHA'S B. F. ADAMS,
Com'r of the State of West Virginia.

Ans. It was left with me by Mr. I. Thomas Chapline. I don't know whose handwriting it is, but the signature is Peter C. Brooks, jr.

Ques. Look at the paper shown you, marked "B," and say whether it is a true copy of a paper served upon you; if so, state whose signature was signed to the paper left with you, and so served. (Which paper, marked "B," is not found among the papers of this cause.)

Ans. It is a true copy. Shepherd Brooks' signature was to it, the paper left with me.

And further this deponent saith not.

CATHARINE S. LUCAS.

To the admission of which the plaintiff objected, and the court sustained said objection; to which the defendant excepts, &c.

The defendant then offered in evidence the depositions of Robert Lucas, Robert A. Lucas, James H. Shepherd, J. P. A. Entler, I. P.
78 Chapline, and A. R. Boteler, and Moses H. Whiting, which are hereto annexed, in the words and figures following:

Deposition of Robert Lucas.

Col. ROB'T LUCAS, a witness of lawful age, being first duly sworn, deposes and says:

Ques. State whether you visited R. D. Shepherd in the fall of 1859, and whether you had any conversation with him in regard to the estate of James H. Shepherd, and the sealed letter which accompanied the will of said James H. Shepherd. If so, state the substance of that conversation.

Ans. Old Mr. Graham had been at work at Mr. Shepherd's. He sent word by Mr. Graham to me, that he wanted me to come and pay
79 him a visit. I did not go. He sent word by the same messenger. I then went, and paid him a visit. He told me that he wanted to sell me the farm that formerly belonged to my uncle, Edward Lucas. I observed to him that I had a great mind to call on his brother, Henry Shepherd, (as I had no acquaintance with him,) to accompany me to his house. He observed, I don't want Henry here. He then went on to state that there was a line between him and his brother Henry, about which they differed. I then observed I was not now able to buy the farm. He remarked "I'll make you able, and I'll sell it to you now." There was a heap of conversation passed between us. I observed that I heard there was a sealed letter with the will of James H. Shepherd. "Oh, yes," he said, "it is in my desk there." and I thought he was going to show it to me from his movements, but he didn't do so. He then turned round, and pointed toward Henry Shepherd's, and said, "I paid eight thousand dollars to save my father's farm, and my brother Abraham's debts, or paid debts for him every time I visited the county." He then went on with a tirade against his brother; said that his
80 father had sent him to Staunton to read law with Chapman Johnston. & he got married and came home to his father's, and he ought to have kicked them both out of the house. I omitted to state, after referring to paying his brother's Abraham's debts, that he said he saved his brother's estate; that it would have been a perfect wreck, had it not

been for his noble friends (Mr. Touro and Col. Montgomery) aiding him and making large advances to him. I omitted to state that, at my last visit there, the property was then to be sold; that he said I would hear from him in less than forty-eight hours or less, after it was sold. I went after to see him, and pretty nearly the first salute was, "James said you bid on it." I said it was untrue—I didn't bid. He said I directed James and Davis Shepherd to attend the sale, and James to buy it in for Catharine. I then was done, and thought I understood the whole man from beginning to end.

Ques. Where do you reside?

Ans. I reside on Rattlesnake Run, within two and a half or three miles of Shepherdstown, Jefferson County, W. Va.

81 Ques. whether you bid on the Lucas farm at the sale in the fall of 1859; and if not, why did you not bid on it.

Ans. I did not bid; from what had passed between old Mr. Rezin Shepherd and myself, I thought it would be bad faith for me to bid, and I didn't bid.

Cross-examination:

Ques. Can you state, with any certainty, when the first conversation to which you have referred as having taken place between Mr. Rezin D. Shepherd and yourself occurred?

Ans. I don't remember exactly; but it was not long before the sale of the land of Edward Lucas, as made by the com'r of the court. The last conversation was after the sale.

And further this deponent saith not.

ROBERT LUCAS.

Deposition of Robert A. Lucas.

ROBERT A. LUCAS, a witness of lawful age, being first duly sworn, deposes and says:

Ques. Where do you reside?

Ans. Two and a half miles south of Shepherdstown, in Jefferson County.

Ques. State whether you purchased the farm in the declara-
82 tion mentioned; and if so, at whose instance, and for whose benefit.

Ans. I bought it in September, 1848, of my father, Edward Lucas, senior, at the instance of R. D. Shepherd, for the benefit of my wife, Catharine S. Lucas.

Ques. How were the bonds you gave for the farm made payable, and what was done with the cash payment?

Ans. Mr. Shepherd furnished me three thousand dollars cash when the deed was made. The check for the $3,000 I handed over to Mr. Lee, the attorney. I don't recollect giving any bonds for the farm at all.

Ques. State when Mr. Shepherd furnished you with more of the fifteen thousand dollars, and what was done therewith.

Ans. He furnished me with six thousand about the first of January, 1849. I transferred the check, by endorsement, to Mr. Lee. It was appropriated to taking up the liens upon the farm, except about ninety dollars.

Ques. State what were your circumstances at the time, pecuniarily, in reference to such purchase?

Ans. Well, my brother John and myself had the farm rented at
83 the time, in partnership. The property wouldn't have more than paid our debts, if that.

Ques. State what was the value of the Lucas farm at that date?

Ans. My father valued it at twenty-five thousand dollars; refused twenty thousand a short time before I bought it.

Ques. Look at the "answer" now shown you, and explain the same. (See agreement, next page, on this page in record.)

Ans. I have not a very vivid recollection of this, but it was written by Mr. Lee, as R. D. Shepherd's counsel; sets forth the facts as they occurred, but it does not mention the secret trust in favor of my wife.

Ques. Are you married? If so, how long have you been married, and to whom?

Ans. I am married; will be thirty years next November; to Catharine Ann Shepherd.

("AGREEMENT."—The "answer" presented to witness is admitted by counsel present, is the same as the answer referred to by William A. Chapline in his deposition for complainant.)

Ques. Are you the same person against whom the suit of un-
84 lawful entry and detainer was brought by Peter C. Brooks, jr., in 1867, and against whom he issued his distress-warrants in 1869 and 1870?

Ans. I am.

Ques. Were you able to buy the Lucas farm in 1848? If not, by whom were you induced to buy it, and upon what representation?

Ans. I was not able to buy it. I was induced to buy it by R. D. Shepherd. He said he intended to do something for my wife, and that if my father agreed to sell the farm he would furnish the money.

(EXCEPTION.—The counsel for the plaintiff excepts to all testimony of the parties in this cause, touching conversations or transactions with R. D. Shepherd, who is now deceased.)

Ques. State whether R. D. Shepherd in that conversation stated for whose benefit he was furnishing the fifteen thousand dollars, and if so, for whose did he say?

(EXCEPTION.—Question excepted to.)

Ans. He said he furnished it for my wife's benefit; that he had raised her, and wanted to do as much for her as if she was his
85 own child. He wanted to buy her a home. And further this deponent saith not.

R. A. LUCAS.

Deposition of James H. Shepherd.

JAMES H. SHEPHERD, a witness of lawful age, being first duly sworn, deposes and says:

Ques. Produce the papers relating to your office as trustee for the sole and seperate use of Catharine A. Lucas, if you held such office.

Ans. I hold that office of trustee; was appointed by R. D. Shepherd, in 1858, about May.

Ques. In whose handwriting is the endorsement on the envelope, marked "E," produced by you, which endorsement is in the words and figures following:

(Endorsed:) "Papers relating to my claim against R. A. Lucas, assigned, &c."

Ans. In R. D. Shepherd's handwriting.

Ques. Are you familiar with the handwriting of R. D. Shepherd, and what opportunities have you had of becoming familiar with it?

Ans. Yes, I am; have been since 1842, having copied many of his letters for him as his amanuensis.

Ques. Look at the assigment on paper, marked "E, No. 1," by the commissioner, and say in whose handwriting it is, and whose is the signature.

86 (Which paper marked "E No. 1," and the assigment thereon are in the words and figures following:)

Paper marked "E, No. 1."

In the circuit court of Jefferson County, Virginia, in term November 4th, 1859.

BENJAMIN T. TOWNER'S ADM'R, PLAINTIFF,
against
EDWARD LUCAS' EXECUTOR, AND OTHERS, defendants. } In chancery.

Commissioner Cooke made his report in pursuance of the decree of this term, to which there is no exception; and this cause coming on to be heard again this 4th day of November, 1859, upon the papers heretofore read and said report, was argued by counsel, upon consideration whereof the court confirming said last-mentioned report, decrees and orders that Charles W. Lucas, executor of Edward Lucas, deceased, do, out of the assets of Edward Lucas's estate, in his hands to be administered, or which may hereafter come into his hands, pay to Rezin D. Shepherd, assignee of the plaintiff, the sum of two thousand four hundred and forty dollars and seventy-three cents, with interest on two thousand one hundred and sixty-nine dollars and twenty-one cents,

87 part thereof, from the sixth day of August, 1859, till paid; and that Robert A. Lucas do pay to the said Rezin D. Shepherd two thousand one hundred and one dollars and seventy-two cents, with interest on one thousand five hundred and thirty-two dollars and ninety-seven cents, from the first day of March, 1859, till paid.

A copy.

Teste: ROBERT T. BROWN,
Clerk of the Circuit Court of Jefferson County, Virginia.

Assignment.

For and in consideration of the love and affection which I bear to my niece, Catherine A. Lucas, I assign the within decree to James H. Shepherd, trustee, for the sole and seperate use of the said Catherine A. Lucas, as if she were sole and unmarried, and direct that he take the necessary legal steps to have the same paid or satisfactorily secured for the purposes of the trust hereby intended.

Witness my hand and seal this the twenty-sixth day of November, 1859 (November 26, 1859.)

R. D. SHEPHERD. [SEAL.]

Ans. It is R. D. Shepherd's handwriting and his signature.

88 Ques. Look at the paper, marked "E, No. 2," and state in whose handwriting it is and whose signatures are attached.

(Which paper and the signatures thereto attached are in the words and figures following:)

Paper marked "E, No. 2."

Memorandum of an agreement between Thomas H. Towner, administrator of Benjamin T. Towner, dec'd, and James H. Shepherd, made this day of May, 1858.

The said Thom. H. Towner, administrator as aforesaid, agrees, for and in consideration of the sum of six thousand dollars, to assign and transfer to the said James H. Shepherd the three judgments obtained in the name of B. T. Towner in the circuit court of Jefferson County, Virginia ag't Edward Lucas, for about $6.000, besides interest and costs, with authority to said James H. Shepherd to prosecute the suit in chancery now pending, to enforce said judgments, or any other he may find necessary for that purpose, in the name of said B. T. Towner's adm'r, which assignment is to be made when said $6,000 shall be paid or secured and said Ja's H. Shepherd, on his part, agrees that, if
89 the widow & heirs of B. T. Towner assent in writing to said assignment, he will, on or before the 20th day of May, 1858, pay for said jud'ments $3,000 in cash, and give his bonds payable to Rob't A. Lucas, each for $1,500, one payable in twelve months, the other in two years, and bearing interest at six per cent. per annum, and to be secured by the endo'sement of said R. A. Lucas and a deed of trust on said Lucas' farm in Jefferson County, upon which he now resides

T. H. TOWNER,
Adm'r of B. T. Towner.
J. H. SHEPHERD.

Ans. It is E. I. Lee's handwriting; and T. H. Towner, adm'r of Benj. T. Towner, and my own signatures are attached.

Ques. Look at the paper, marked "E, No. 5," and state in whose handwriting it is, and whether the signatures thereto are genuine or not.

(Which paper and the signatures attached thereto are in the words and figures following:)

Paper marked "E, No. 5."

Whereas there is a suit now pending in the circuit court of Jefferson County, Virginia, wherein T. H. Towner, administrator of B. T. Towner, is complainant, and the administrator and heirs of Edw'd Lucas
90 and others are defendants, we, the undersigned heirs of B. T. Towner, hereby request the administrator to compromise said suit and consent and agree that he may assign and transfer the judgments obtained by Benj'n T. Towner in his life-time against Edward Lucas for about six thousand dollars, besides interest and costs upon such terms as, in his judgment, he may think best, hereby agreeing to confirm any arrangement the said T. H. Towner may make for the transfer of said suit.

Witness our hands and seals this 4th day of May, 1858.

JAMES L. TOWNER. [SEAL.]
JNO. ED. SCHLEY. [SEAL.]
MARY V. SCHLEY. [SEAL.]
ELLEN LEE TOWNER. [SEAL.]

Witness:
JOHN SNYDER,
J. H. SHEPHERD.

Ans. It is my handwriting. The signatures are genuine, having witnessed the signing of it.

Ques. Look at paper, marked "E, No. 4," and state, if you know, in whose handwriting it is and whose *is* the signatures thereto attached,

(Which paper and the signatures thereto attached are in the words and figures following:)

Paper marked "E, No. 4."

STATE OF VIRGINIA,
Jefferson County, to wit:

91 BENJAMIN T. TOWNER, PLAINTIFF, *against* EDWARD LUCAS, DEFENDANT. } In debt.

At a term of the circuit superior court of law and chancery for Jefferson County, commencing the 18th day of May, 1844, the plaintiff recovered against the defendant, in the above-named suit, judgment for $2,000.00 for debt, with interest thereon, to be computed at the rate of six per centum per annum from the 31st day of December, 1841, till paid, and $6.55 cts. costs of suit.

THE SAME, PLAINTIFF, *against* THE SAME, DEFENDANT. } In debt.

At a term of the said court, held for the said county, and commencing the 19th day of May, 1845, the said plaintiff recovered against the said defendant, judgment for $2,000.00 for debt, with interest thereon, to be computed at the rate of six per centum per annum, from the 31st day of December, 1841, till paid, and $6.55 *cents* costs of suit.

THE SAME, PLAINTIFF, *against* THE SAME, DEFENDANT. } In debt.

92 At a term of the said court, held for the said county, and commencing the 18th day of May, 1846, the said plaintiff recovered against the said defendant judgment for $2,169.21 cts. for debt, with interest thereon to be computed at the rate of six per centum per annum from the 31st day of December, 1841, till paid, and $6.55 *cents*, costs of suit.

(Copies.) Teste: ROBERT T. BROWN,
Clerk of the Circuit Court for Jefferson County.

I, Joseph A. Chapline, judge of the circuit court of Jefferson County, W. Va., certify that Rob't T. Brown was the clerk of said court at the date of his attestation hereto affixed, and that his attestation is in due form of law.

JOSEPH A. CHAPLINE,
Judge 6th C't W. Va.

Know all men by these presents that I, Thomas H. Towner, administrator of Benj. T. Towner, and for value received, do hereby assign and transfer to James H. Shepherd the within three judgments against

Edward Lucas, s'r, deceased, revived against his administrator, and for the recovery of which a suit is now pending on the chancery side of the circuit court for Jefferson County, V'a, against the administrator of said Edward Lucas, s'r, Robert A. Lucas, and the heirs of said Edward Lucas, s'r; and I hereby authorize and empower said Ja's H.
93 Shepherd to continue to prosecute said suit, or any others he may be advised to be necessary & proper for the enforcement of the liens and recovery of said judgements, in my name, but at his own proper costs and charges.

Witness my signature and seal this 20th day May, 1858.

T. H. TOWNER. [SEAL.]

VIRGINIA, *Jefferson County, sct:*

Personally appeared, T. H. Towner, before the subscriber, a justice of the peace in and for the county aforesaid, and acknowledged the foregoing writing to be his act and deed.

Witness my signature this 31st day of May, 1858.

JNO. H. McENDREE, *J. P.*

Ans. I don't know whose handwriting it is. The signatures are T. H. Towner's and John H. McEndree's, and are genuine.

Ques. State whether you are the person to whom the assignment in paper, marked "E, No. 4," was made; and if so, for whose benefit was the same made?

Ans. I am the person, and it was made for the benefit of Catherine A. Lucas.

Ques. State whether or not you ever became, or was ever, in any way, made a party to the suit of Towner's administrator, vs. Edward Lucas' executor, R. A. Lucas, and others, in the circuit court of Jefferson County.

94 Ans. Yes; I was made a party by those assignments, but not otherwise.

Ques. Look at paper, marked "E, No. 3," and state, if you know, whose the signatures are attached thereto, and any further knowledge you may have with regard to that paper, which would benefit either party.

(Which paper and the signatures thereto attached are in the words and figures following:)

Paper marked "E, No. 3."

Memorandum of a contract and agreement made this 30th day of August, 1857, between R. D. Shepherd and Robert A. Lucas, both of Jefferson County, Virginia.

Whereas at a public sale made by E. I. Lee, as trustee and commissioner, on the 6th day of August, 1859, said R. D. Shepherd became the purchaser of the tract of land in said county of Jefferson, belonging to said Robert A. Lucas, and upon which he now resides, containing, by a recent survey thereof, about 293 acres.

It is agreed that said Robert A. Lucas shall continue on said land, as tenant of said A. D. Shepherd, until the 1st day of April, 1861, yield-
95 ing and paying to said R. D. Shepherd, his heirs, exec's, or assigns, as rent thereof, two-fifths of the present growing crop of corn, and two-fifths of all future crops to be raised on said land. The corn to be cribbed on the land, and due notice thereof to be given

to said R. D. Shepherd; and the other rent to be delivered in due season, either in Shepherdstown or Duffield's depot, or such other place not more remote, as said R. D. Shepherd, his heirs, exec's, adm's, or assigns may direct and appoint; and the said R. A. Lucas for himself and his heirs, covenants to and with the said R. D. Shepherd, his heirs, exec's, &c., that he will cultivate said land in a judicious and farmer-like manner; and with a view to its improvement; that not more than two-fifths of the cleared land shall be cultivated in any one year, viz, about one-fifth as fallow, and one-fifth in corn; that upon which small grain is sown, to have clover-seed sown on it at the rate of a bushel to eight acres, the clover to remain two years before it is turned under, and not to be pastured too close; the small grain to be threshed on the land; the straw not to hauled off the land, but to be converted into manure, and to be distributed in a farmer-like manner. The
96 clover to be plastered at the rate of a bushel of plaster to the acre; that he, the said Robert A. Lucas, shall keep the fences in good order and repair, and so deliver up the premises at the expiration of the lease. The rails or other material thereof to be procured from the timber land of to the demised premises, using only such trees as are dead or decaying, unless otherwise authorized by said R. D. Shepherd.

To the faithful performance of all which the said Robert A. Lucas hereby binds himself & his heirs.

Witness the hands and seals of the parties aforesaid the day above first written.

R. D. SHEPHERD. [SEAL.]
R. A. LUCAS. [SEAL.]

By consent of parties to this lease it is agreed that the rent for the within-mentioned land, instead of a portion of the crops as therein-named, shall be a monied rent, to wit, eight hundred and thirty-three dollars and ninety-three cents, to be paid on the 30th day of June, 1860, and the like sum on the 30th day of March, 1861. The other terms of the lease remaining unaltered.

Witness the signatures and seals of the parties this 2d day of
97 December, 1859.

R. D. SHEPHERD. [SEAL.]
R. A. LUCAS. [SEAL.]

Ans. The signatures are R. D. Shepherd's and R. A. Lucas'. I have no knowledge about the paper.

Ques. Did R. D. Shepherd make any statement to you in regard to the rent specified in paper "E, No. 3," and how it was to be appropriated?

Ans. Yes; he did make a statement. He said he did not wish to receive the rent, but wished the whole of it to go towards improving the buildings on the place.

Ques. Look at the letter, marked "F;" say in whose handwriting it is. (Which letter, marked "F," is in the words and figures following:)

Letter marked "F."

BALTIMORE, 17 *Feb'y*, 1861.

DEAR CATHERINE: Your letter of the 12th inst. came duly to hand. The agreement you sent is all that is necessary. Had a lawyer drawn it up he would have occupied two full pages with ridiculous repetitious

and technical phrases. I hope you will get on with your improve-
98 ment without much embarrassment or trouble. I know that it is not only a serious but a dangerous matter for a farmer to make improvements, especially if he goes on credit. In short, when once a farmer gets in debt he rarely, if ever, gets out of it, and may be considered as the greatest stone on his place. Therefore, they one and all should abhor debt quite as much as they do the d—l.

Where are you sending your daughter to school? Three hundred dollars is just three times as much as it ought to cost. I suppose you are giving her what is called the accomplishments—music, drawing, dancing, and all that kind of nonsense, admirably calculated to make her good for nothing and discontented. A farmer's daughter should be taught to read & write, and do all kind of house-work, and to wait on herself.

Truly yours,

R. D. SHEPHERD.

Ans. It is R. D. Shepherd's handwriting, and signed by him.

Ques. State whether you knew anything about the notes of R. Bainbridge and L. D. McCutchen, given to James H. Shepherd, your uncle, for the purchase of Oakland plantation; and did you ever hear
99 R. D. Shepherd say anything about the collection of said notes; and if so, what.

Ans. No; I don't know anything about the notes given by R. Bainbridge and L. D. McCutchen. I know R. B. and L. D. McCutchen bought the plantation, and it was paid for.

Ques. State whether you know anything about the notes given by John F. Miller to James H. Shepherd; whether or not the same were collected; and if so, by whom.

Ans. All I know about these note of Jno. F. Miller to Ja's H. Shepherd was learned from R. D. Shepherd's books. I don't know that they were these notes, but there were notes held by R. D. Shepherd against Miller. In making the settlement with Miller he took property and notes from Miller in payment of his indebtedness to the estate of James H. Shepherd, and those notes were collected.

Ques. Do you know anything about the indebtedness of J. B. Diggs to the estate of James H. Shepherd, and whether such indebtedness was ever liquidated?

Ans. Ja's B. Diggs was largely indebted to the estate of James
100 H. Shepherd, which indebtedness was liquadated.

Ques. State what your opportunities were of knowing the facts referred to in your last two answers.

Ans. I kept the books of R. D. Shepherd for a number of years, which afforded me an opportunity of knowing. I also heard him say that he had settled with Diggs, and would get every dollar due estate of James H. Shepherd.

Ques. Will you please to state what became of James H. Shepherd's gold watch, mentioned in the sealed letter which accompanied his will?

Ans. It was left by him to Mr. Judah Touro, and was received by him and worn until the time of his death. After his death it was handed to me by Mr. R. D. Shepherd.

Ques. Did you ever show your father's will to R. D. Shepherd?

Ans. R. D. Shepherd brought me a copy of my father's will shortly after his death, whilst I was in New Orleans. He remarked, "Its a good will, notwithstanding he has left you without a shilling.

And further this deponent saith not.

J. H. SHEPHERD.

JAMES H. SHEPHERD recalled by defendant's for further ex-amination-in-chief.

101 Ques. State if you had a conversation with R. D. Shepherd just before the sale of the Lucas farm by E. I. Lee, as commissioner, in August, 1859. If so, state that conversation, and what instructions he gave you, if any.

Ans. I had a conversation with Mr. R. D. Shepherd about the farm about a week or ten days before the sale. He requested me to attend the sale and bid on the farm; and if I could buy it at seventy-five dollars per acre he would give me a deed in my own name, to be held by me for the benefit of my sister, Catharine A. Lucas, and her children.

Ques. Did you ever hear him say for whose benefit the farm was bought after the sale? And if so, what did he say?

Ans. I never heard him say after the sale.

And further this deponent saith not.

J. H. SHEPHERD.

Deposition of J. P. A. Eutler.

J. P. A. EUTLER, a witness of lawful age, being first duly sworn, deposes and says:

Ques. Examine paper shown you marked "C," and state what it is a copy of, and in whose handwriting the original letter of which it was a copy was.

(Which paper is in the words and figures following:

102 *Paper marked "C."*

NEW ORLEANS, *9th October*, 1838.

DEAR BROTHER: I have received your letter of the 12th inst. You do not seem to understand that the check I sent you on the bank was money, and from your letter I don't know whether you mean to take it or not, as you use the following words: "You have again offered me money. This was not expected or desired. You have ample funds near me to which I can have access, &c." Again you say: "It would be an imposition on you to touch your funds in Baltimore for any purpose of mine. All I desire you to do is to direct Henry to pay me, &c., &c." Now, I cannot understand from this whether you mean to draw the money from the bank or not. If you require it do so at once. If not, return the check to me, as I cannot touch the money so long as that check is out. If you owe store accounts you had better take this money and pay them. As to calculating on your own resources for such a purpose would be useless. Write me by return of mail, and say whether you use the check or not.

103 I am much obliged to you for saying what you did regarding Ann's impatience and dissatisfaction. It is really too bad, after what I am doing, that any member of the family should allow one word to escape their lips in the way of complaint. I am now determined to alter my will, and Ann shall have every cent her brother directs, which is, as you know, only five thousand dollars; and this shall be paid to her long before it comes into my hands. Indeed, the payment for her house will be some part of this amount. So much for her talking. Had she held her tongue it would have been better for her and her family. What you told mother were the true facts of the case, and Mr. Touro has the original letter in his possession, a copy of which you have seen,

(I mean the sealed letter left by James with his will,) and this directs that mother shall renounce all claim to the estate, and that Ann shall have only 5,000$; Moses nothing; Eliza 10,000$; the residue to be divided amongst his nephews and nieces, double as much to the boys as girls; but all these things you know, as you have seen the letter.

I have come down to the city for the purpose of sending up supplys for the rol'ing (harvest) season which will commence in a week or
104 two. The crop of corn has been good; that of cain only so so. If we are favored in the season, that is, no early frost, I hope we will make as much as last year. Nothing but the most unwearied & untiring industry will bring things out, and if my life and health is spared there is no danger. I think your boys had better all stay where they are. It is to be much deplored that they have not been better grounded in an English education. I therefore strongly recommend that as much lost time may be made up as possible. If James is active and smart he may do something, and if he could now write a good hand & read correctly I would take him; but without these and a knowledge of arithmetic he would be useless to me. If you will therefore put him to school & keep him at it constantly, when he is qualified I will take him, and if there is anything in him I will get it out of him. I cannot talk about buying land in the Neck at present. A man as much in debt as I am must lessen demands and not increase them. You will require every cent I can spare to make your little improvements. Get the [torn] first, then we will see about the land.

105 Gov. Ev'rett, the present governor of Massachusetts, has written a few appropriate lines to be put on the tomb of our deceased brother. Ellen is attending to it in Boston and will have it completed this year. It is an obelisk of 10 or 12 feet high, made of marble. The inscription is:

"Sacred to the memory of James Henry Shepherd. He was born at Shepherdstown, in Virginia, on the May, 1790, and died at New Orleans, in Louisiana, 27 July, 1837. As a merchant, he was prosperous, but not envied, for his wealth was honorably acquired and liberally dispensed. He was a dutiful son and an affectionate brother; beloved by his friends and the object of public confidence in doubtful times. He died suddenly, at the meridian of life, without ever being the cause of sorrow to a fellow-being, except in his untimely and universally lamented death."

Ellen writes me that Mr. Everett sent her this epitaph, with a note stating that he would make any alteration that she might suggest, & that he could at least say that every word of it was true. Poor Moses!

I sometimes get much provoked with him, because he acts and
106 conducts himself so foolishly; then again I pity him from the bottom of my heart. I cannot have that affection & respect for him that I wish, because he has not a single trait to admire. His mind is all wrong, and God only can put it right.

Truly yours,

(Signed) R. D. SHEPHERD.

Certificates on page 4, of paper marked "C."

We, the undersigned, whose names are hereto attached, have carefully compared the letter of R. D. Shepherd, shown us, of which this is a copy, which letter was all in the ha'dwriting of said R. D. Shepherd, with whose ha'dwriting we are well acquainted, and we pronounce this a correct copy of said letter.

Shepherdstown, W. Virginia, February 2d, eighteen hundred and sixty-seven.

WILLIAM BORDIN.
A. R. BOTELER.
JNO. REYNOLDS.
J. P. A. EUTLER.
JACOB TERRELL.

I have fully examined the letter of R. D. Shepherd, dated "New Orleans, 9th October, 1838," & compared the same with many of
107 said R. D. Shepherd's checks, now in my possession as agent of the Branch of the Valley Bank, at this place. Upon such examiantion and comparison I do not hesitate to say that the said letter of October 9th, 1838, is, to the best of my knowledge & belief, the genuine handwriting of said R. D. Shepherd. Mr. Shepherd for many years kept a large account at this bank when I was an officer, from October, 1839, up to this time. In that an opportunity was offered me of seeing very often Mr. Shepherd's letters and checks, & enables me to speak with a good deal of confidence as to his handwriting, & especially his signature. The copy upon which this certificate is written I have carefully compared with the original letter, and pronounce it a correct copy.

W. N. CRAIGHILL.

CHARLESTOWN, *Jefferson Co., W. Va., to wit:*

Sworn to before me this 8th day of March, 1867.

JOHN AVIS,
Mayor Charlestown.

Ans. To the best of my belief the original was in the handwriting of R. D. Shepherd.

Ques. State whether or not you were familiar with the handwriting of R. D. Shepherd, and whether the certificate on page 4 of paper "C," signed by you is correct?

Ans. I frequently saw his handwriting, and the copy I saw was
108 the same I had been accustomed to seeing. Said certificate signed by me is correct.

Ques. Examine the writing shown you, marked "D," and each leaf thereof, and say whether the initials on each leaf are in your handwriting, (I mean the initials "J. P. A. E.,") and whether the certificate attached thereto on the last leaf was signed by you, and whether or not the facts stated in said certificate are true.

(Which writing, marked "D," and each leaf being marked with the initials "J. P. A. E." is in the words and figures following:)

"Writing marked D.—Letters."

No. 1. From R. D. Shepherd to Abraham Shepherd.

BALTIMORE 21*st Aug't*, 1837.

DEAR BROTHER: In the course of a few days I shall have a statement of our late brother's affairs, when I will immediately put my own concerns into such a shape as will carry out his wishes as well as my own, so far as human foresight and my own feeble ability will permit. I find his estate much involved, but, if my life is spared, I do not apprehend much difficulty in bringing things all right in the course of a few years; but in case of an accident to me, I wish you to under

stand & know my wishes & views, and for that purpose I may
109 wish you to come down here and pass two or three days with me before I break up house-keeping, in order that we may talk the thing over, as I do not expect to visit Shepherdstown again before I go out to New Orleans. You need not let anybody know you are coming, but get on your horse at 6 o'clock, go over to Harper's Ferry, and be sure you are at the cars before the clock strikes ten. Let one of your boys go over with you to bring the horse back and tell him to be back the fourth day afterwards at 2 o'clock with a horse to take you home; that will give you one day to come down, two to stay here, and one to go back; for instance, you leave home on any Monday morning; see that one of your boys brings over a horse for you on Thursday, by which means you will be home the same night. The cars start from *from* near the bridge. You will get a ticket from the office, for which you pay $4, and which you keep until you arrive near to Baltimore, when you give it up. This will be a pleasant trip for you and give you an opportunity of seeing what a railroad is. I enclose you $50, and recommend your getting a good suit of black clothes; you need not bring a bundle
110 of any kind with you as I can supply you with anything necessary, and will promise you that you shall be as retired & quiet in my humble mansion as if you were in your own. Write me what day you will come down & I will be at the depot to show you my residence, which is at the corner of Gay & Second streets. I have got the power of attorney you had executed; it appears to me not to be as an efficient document as I had previously forwarded; but you know there is often in law as well as in everything else more in form than in substance.

Write me immediately on receipt of this & I am truly yours,

(Signed) R. D. SHEPHERD.

Letter No. 2. From R. D. Shepherd to Abraham Shepherd (near Shepherdstown.)

BALTIMORE, *8th October*, 1837.

DEAR BROTHER: Your letter of the 4th inst. has been duly received, and I am glad to hear the two calves that are to be sent down are improving; would have been more so to know that they were in condition.

It is now two months since I told Henry that they would be sent
111 for about the 10th, and that they must not come here unless in fine order as they would be rejected. It was on this account that I felt uneasy. The time has arrived, and the purchaser informed me yesterday they must be here as soon as they can be sent, and not to exceed the 20th inst. I accordingly think it safest to send Bazil after them, and *await* of the opportunity to drop you a line.

I do not think Mr. Clay has any idea of visiting Jefferson County, and if he had it would be impossible for me to accompany him, as I expect to leave here in three weeks, and have my hands full. I assure you I don't know what you mean when you say, "you may remove some prejudices that I suspect have been entertained against our family. Whence the origin of these prejudices I cannot positively say—from political animosity, false & malicious representations, or the basest of all, envy." I am really sorry that you should allow such an idea to cross your mind as to believe there exists any prejudices against our family. Who is prejudiced? A ridiculous set of village gossips too contemptible to give a thought. And approving conscience, correct moral conduct, a strict observance of all the decencies of life—adhere
112 to these, and a fig for all the prejudices of the world. The

great & the good will always respect & honor only such. I assure you that I do not feel it necessary to be backed by Mr. Clay, or any other man that lives, to add one jot to my standing or respectability; and as to our own family—there they are! Look at them! They speak for themselves. I do most solemnly believe they are about the most respectable, the most independent family in Virginia: therefore, why talk about prejudices. If they exist, think & know them to be too contemptible to occupy a single thought; and I must confess I am surprised that you should have condescended to attend to such a subject at all.

I wrote you by the mail some twelve days ago, and sent you a receipt for two bales & two boxes, directed to Lane & Webb. As you do not acknowledge the letter I am afraid it has not reached you. In the course of this week I shall send you & Henry each two bags of salt, one fine and one coarse, and at same time shall forward a box from Ellen for the two girls; and tell them after they are fitted out from the box that one or both of them must go with mother to church every Sunday. I find that one of the ink-holders belonging to the ink-
113 stand I sent you, was left out. It shall be put into the box with the girls' finery, and will go to Harper's Ferry this week.

Mr. Touro is still making battle with the probate court and hopes to keep the harpys at bay until I come out. The last communication had been received, and was as correct as a dye.

The visit of Judge Tucker gives me rather a poor opinion of him, as I have no doubt Mr. Clay spoke to him as he does to everybody else. When alluding to me or the family he always takes occasion to have it understood that we are on the most intimate and friendly footing. The judge discovered this and then run off to see who these Shepherds were. Well, he has seen them. If he likes them it is well. If he does not, who cares. The Shepherds are more independent than he is. They ask assistance from no man, and fear nothing but God. The judge is a public man and public servant—is dependant. As a politician, must trim, fawn, and at times flatter; and now when he sees that Mr. Clay will, in all human probability, be our next president, he wishes to curry favor. And how does he wish to come at it? By paying a visit to this family, against whom there are prejudices entertained by half
114 the old women in the county, and nobody else, I am sure.

It will be a grand good piece of management if we can carry our point in the probate court at N. Orleans. It would save twice as much money as would buy all Terrapin's Neck, and build you a palace into the bargain. The judge thought he would force the administrators to take out letters, file an inventory, &c., &c., by withholding all the available assetts of the estate, but we have thwarted him on that. My notes have been given to take up those of our late brother falling due, when it could be done. I have raked & scraped up every dollar I could muster and sent it forward, nearly $50,000; and Mr. Touro, like a good fellow, shells out any balance, so that all debts or demands against the estate are met as they fall due, notwithstanding we get no assistance from the property of the estate. This makes the judge & lawyers stare at each other & exclaim with Dominie Sampson, "prodigious." I have tried hard to fill the sheet, as you will see, and have at last succeeded after a manner. Now write me by Basil's return; & am truly y'rs.

(Signed) R. D. SHEPHERD.

115 This being Sunday and idle day must account for this long letter about nothing. I shall not probably have time to write to you again before I leave here.

In this way I expect to help Henry a good deal. I have written you a long letter because it may be some time before I can quietly sit down and do a similar job; and as I have made up my mind to pursue a different course in regard to your children, after a year or two I shall hope to be ready for you to begin to buy land all around you, so as to have your children established in your neighborhood, because I am convinced it will be the safest & most rational way of their getting through this wicked uncertain world; but this cannot be moved in until you yourself are made comfortable. Therefore, bestir yourself. There is your mill, your distillery, your brick barn, and your house. Go ahead; begin to prepare your materials. The money shall be forthcoming as fast as you want it. Don't delay, because who can say what will happen.

I shall be glad to hear from you; & am truly yours.

(Signed) R. D. SHEPHERD.

116 Letter No. 4. From R. D. Shepherd to Abraham Shepherd.

NEW ORLEANS, *May 1st*, 1838.

DEAR BROTHER.—On my return to the city from the plantation a day or two ago I received your letter dated 30 March, post-mark 11th inst. My mind is fully made up that Golden Grove cannot be held as I suppose' it could be, and my plans must be changed in toto.

It is very natural for one at a distance to suppose things can be easily done which a little pract'cal experience will very soon prove entirely impract'able. How much you are mistaken when you say that a constant residence is not necessary. There is no property or business of any kind that will not soon go to ruin if it has not the personal attention of the owner; and not one man in five—I may say twenty—possesses all the qualifications to conduct a sugar estate. It is an immense machine; scarcely one day that something does not take place requiring judgement to put right. The owner of a property of this kind should be the hardest working slave on the estate. As to a faithful agent, no such thing exists, and he who depends upon others will soon go to the wall

117 For this reason any attempt to reduce your expenses by having a farm in Ohio, so far from being of assistance, would be a total loss, for you would find it would not support itself. Instead of your drawing cattle & pork from it you would, in all probability, have to send supplies, for the simple reason that any agent or person who' you would place there would never raise more than they would consume. Men who work themselves, and nine out of ten who work their own farms, will never do more than is necessary for their own support. To have surplus produced there must be great industry & hard labor. In a word, my experience proves that no business can ever thrive that is not managed by the owner or master; & not then unless he is a man of industry, and some brains in his head; and the more irons in the fire the more sure are they all to burn. I have now lived more than fifty years in this world, and few men have seen more of it or been more actively employed than myself, in various ways, and I am confident there is no situation more independent or agre'able than a farmer in Jefferson County, Va. Give him three hundred acres of land, with good improvements, & well stocked, & he has as much as he can do to attend to it, & from it will he

118 draw a most comfortable support for himself & family. Under this connection I have been induced to change my plan as regards Golden Grove. I shall either sell it myself, or, in case of my death, I shall order it sold, because I know it will be impossible to carry my plan

of holding it in the family into effect. Such a notion appears very pretty on paper, but can never be carried out. I therefore abandon it and am willing to do anything in my power towards procuring lands in Jefferson County, to settle down your boys. Your suggestion of buying Whiten's land I think a good one, provided you can get it at a proper price, and also, provided you can dispose of your own. Moses will be here in a few days, and I will sound him on the subject, and when he returns you must see what you can do with him. I would not however talk to anybody about my plans. At what price do you suppose you could buy Whiting' land. How are the improvements on it, & are there not a good many negroes that might be had with the land? Enquire into all these matters & let me know, as I do not think it will be in my power to leave here this season. I have the ability to hold Golden Grove, but I shall sell it the first good offer I can obtain. My price is $250,000. And
119 if times mend I shall get it before three years—plantation. I am much occupied at the plantation in repairing the buildings & putting up necessary new ones. The crop looks well. I have about 900 acres in cultivation—500 cane & 400 in corn. When I left we were running thirty ploughs; had gone over the whole crop twice, and every part of it as clean as your hand. We keep fifty work-horses and as many oxen. Our yearly expenses is from 12 to 15,000$. The crops ought to average 35 to 40,000$, but the low price of sugar and the probability of its being lower, plays the deuce with us. One of the great objections to farming or planting in this country, is the want of good grass for hay. There appears to be no grass yet found out that will do well in this climate. Write me as often as you can. I learn from Ellen that Henry has been selling some of his cows. I dare say what he has done is all for the best. Henry must make up his mind to one thing, & that is, he must pay the penalty of being a rich man, which is, that almost every body will cheat him if they can, and but few will scruple as to the means. Every man who becomes embarrassed & poor is very apt to become a scoundrel. The only way is to avoid all such & have no dealings with them,
120 unless here is one & there is the other. Let me know who has the settlement of Mr. Worthingston' estate. It owes Ja's' estate $2,000, and I wish to let them know the fact. I suppose that is all I shall ever get. It was for money lent, which W. pledged his honour should be p'd, but the fellow had neither honour no honesty.

I wish you to say to mother that I sent two boxes, directed to her a day or two ago, to Mr. Harrison in Baltimore, to be sent to Mr. Webb in Shepherdstown. Those boxes contain the clothes of our deceased brother, which she will dispose of as she thinks best. In one of the packages she will find a small paper box containing some of his hair. I am delighted to hear of mother's good fortune, & she does right to spend her money in that way most agre'able to herself. My health is good, though I fret and worry more than I ought in this hot weather. Thermometer to-day 86. Yr's.

(Signed) R. D. SHEPHERD.

Letter No. 5. From R. D. Shepherd to Abram Shepherd.

NEW ORLEANS, *May 4th*, 1838:

DEAR BROTHER: I wrote you on the 1st inst, on which day
121 Moses come down to make arrangements to return home which he has accomplished, and if no accident happens you will see him, bag and baggage, about the 1st of June. I have had several conversations with him on the subject of buying your land, telling him frankly

your object in selling. He says he will buy your land and give you a fair price. I therefore see no cause why Whiten's land cannot be bought by you, and the only difficulty that I fear in accomplishing your entire object, is that they may demand too high a price, and Moses may want yours at too low a rate. These are matters that can only be ascertained by inquiry, and in the course of a very short time you will be able to know precisely what can be done. I am not sufficiently acquainted with the value of property to form any opinion, but should think that Whiten's land is not worth over 25 or 30$. Payable in 1, 2, & 3 y'rs, with ¼ cash.

I have thought a good deal on the subject of your change of plan, and approve it. Your reasons for so doing are good, and you may count on my most cordial co-operation to carry them into effect. At present I can say no more. You must do the best. See what you can buy from the Whitens at, and then see the best Moses will do. Let
122 me know, and I will soon tell you whether it will be in my power to make your e'gagements good, and I am sure it will be if my life is spared and the parties on both sides are reasonable. I am very desirous indeed. It is at this time the fondest wish of my heart to see your sons all brought up steady, industrious farmers. There is no profession, in my opinion, so respectable, and certainly none so independent. I am willing, therefore, to make great exertions to have them established, and I should consider the business done if we succeed in the plan now proposed, which, I repeat, strikes me most favorably.

A few mornings since, while at breakfast, (for Moses stays with us when here,) I happened to mention what you had written me about the church, and told Moses that he must be prepared to come out liberally on his return, as all the alterations which mother wished to have made in the church must be effected, and that he was relied upon for a large contribution. Mr. Touro, who sits at the head of the breakfast-table, and very seldom speaks at all, inquired: "How much money will be wanted?" "Oh, not more than two or three hundred dol-
123 lars, after Moses' contribution." "I will give it, and will hand you the money to-day." "By Geo.!" says Moses, "I must come out now, and will give as much as I can afford." "And I, too," says I, "will help by giving a handsome silver bowl, to be added by mother to the plate already given; and, after the church is done, will give a bell, and after that, if I am successful, a clock; that is, provided a belfrey or steeple is built & place left for the clock, the dimensions of which shall be given." Now, all this took place at our breakfast-table. I have written to mother, and told her to go on and make such alterations as will please herself. She, Touro, Moses, & myself must pay the expenses. All this will, I trust, make mother happy; and I wish you would see that she writes a proper letter of acknowledgment to Mr. Touro, but tell her not to take the trouble to write to me.

I do not think it will be in my power to leave here this summer. There are so many links in the chain that some of them will be sure to break, and so bungling are all hired agents that they could not be mended, and heavy losses would be the consequence. Now, such is the state of my affairs that I cannot bear a heavy loss; therefore, no effort must be spared to prevent it; though, after the crop is put
124 by, which will be in July, I mean to take a trip of two months, if possible. Of this I will not determine until that time, say, two or three mo's hence. The crop now looks well, but everything is eat up in expenses. I am now busily engaged in building a cow-house & repairing the stable at Golden Grove, so as to be prepared to house

some of the stock here, say, Ayreshire & two or three of the colts. My cow-house is 40 by 26, which I calculate will give me two cow-houses of 6 stalls each, & a feeding-room of 12 feet. I think I can sell all Henry's colts here to good advantage. At any rate, it is worth trying, and I hope to be prepared by the fall to release him of everything he wants to get clear of. The house at G. Grove is also much out of repair, which will be a heavy job. Indeed, there is nothing but expense in a sugar estate.

I am truly yours,
(Signed) R. D. SHEPHERD.

Letter No. 6. From R. D. Shepherd to Abraham Shepherd.

NEW ORLEANS, 24 *June*, 1838.

DEAR BROTHER: I have had the pleasure of receiving your letter of the 1st instant, and note all the advantages & disadvantages of Whiting' land; and, since first writing to you on that subject, I have had
125 time to think and reflect, and have come to the conclusion that, at your time of life, with your habits and constitution, it would be too great an undertaking for you to improve that place; but I think it would be desirable to have it for your boys if it could be purchased low, say 12 or 15$ an acre: and you may offer 15$ an acre for it, payable ⅓ cash, and the balance in one and two years, without interest; but, in the meantime, go on with the improvements at home, the same as if you had no such thing in contemplation, and make yourself and family comfortable. I hope nothing will prevent your proceeding; too much time has already been lost. It will not be in my power to leave here this summer. There are many things that require my constant personal attention, especially up at Golden Grove, where I have not got nor can I get the right kind of people. To leave so great a charge in the hands of hirelings cannot be done without too great a ris*que*, and, unfortunately in this country, no man can be hired that is worth anything, as all of the right sort work on their own account. I am obliged to pass much of my
126 time up at Golden Grove, and I never go there without feelings of disgust, as there is scarcely an hour in the day that there is not some unpleasant circumstance or other that takes place; and all owing to a wrong system that has forever been adopted on that place. To make a radical reform is almost impossible, and even to arrange matters so as to make it a desirable property is impossible, unless I were twenty years younger and I would consent to go there and take the entire charge, thereby making myself the greatest slave on the place. I have already made some changes. The house, quarter, & buildings do not now present quite as ragged appearance as they did. The house, like all large houses in the Southern States, has never been finished. The west wing, to make it correspond with the east, has never been built, so that the house looks like any deformed object. Stables and out-houses all tumbling down. To repair these and to build the west wing will keep me very busy for 12 mo's to come. I do the whole with my own people. The crop will be laid by in ten days, when I shall go to work & make 150,000 brick and hope to have the wing & back-gallery all under roof before 1st Jan'y. I am sure the place would sell the sooner if
127 these things were done; & sell it I will the first good offer I have. We have not more than 800 acres under cultivation. There should never be less than one thousand—nine hundred at least—say six hundred acres of cane & three hundred acres of corn, peas, & pumpkins. Say to mother that Mr. Touro has received her letter and is quite proud

of it. He talks of nothing else. Also, tell Moses that I have his of the 8th inst.; that his money shall be sent the moment he wants it. Also remittances for Francis Hook. All he has to do is to tell me what day he wants it & it shall all be forthcoming. Tell Henry to go on to advance you any money you may require for your improvements. He will, no doubt, receive the money from Mr. Clay. Your idea about the expenses on Mr. Clay's cattle is right. He bought from me a hard bargain, and it is but small recompense to dock off the expenses of the Ayrshires. I therefore hope Henry wrote him to that effect. I am off to-morrow morning for G. Grove, and shall not be back for three weeks, which will be three weeks spent in fretting, scolding, & worrying, all of which is wrong, indeed foolish, but it is my nature and I cannot help it. I shall not be at all surprised to find myself there alone before the
128 summer is out, as I frequently feel a strong inclination to turn every white man off the place, as totally neglectful of their duty. I am told if I do so I shall be obliged to take those who are still worse.

I wish you to be very particular to see that all your children go regularly to school, and tell Henry & Moses that I hold myself bound to pay one-third of the expense of the school in order that it may be kept up for the benefit of the family. A proper letter has been written to James Worthington, and the account furnished, $1,700. I find McComb owes the estate $600, which is of course lost, and poor brother, from his goodness of feeling, has lessened his property much, & I wonder he did not ruin himself. Now, for my part I have no sympathy for anybody out of my own family & for my immediate friends, so I shall never lose by being liberal.

Y'rs.

(Signed) R. D. S.

Letter No. 7. From A. R. Shepherd to Abraham Shepherd.

NEW ORLEANS, 18*th August*, 1838.

DEAR BROTHER: My last letter from you is dated 1st June,
129 and since that I have had no account of your progress in the way of making yourself comfortable. By a letter received a day or two since from Moses I find the Whitings had named a price to you for their land, (35,000$,) which is so perfectly ridiculous that you must not give it a second thought, but now turn all your attention to improve your own. Make yourself comfortable, and don't think about your children. Let them take care of themselves. Give them as much education as you can; good advice and good example, and then let them take their chance. If there is anything in them it will come out; if not, expectations would only ruin them. From all the information I have from either you or Henry I cannot find out that he has advanced you more than 200$, which is named in your last. Now, I know this sum would go but a small way towards your contemplated improvements. Henry must have ample funds of mine in his hands, and why have you not called on him freely for them. You may depend he will never volunteer. He has received 1,000$; from Beltzhoover, for three cows, 500$. He drew from Mr. Harrison 700$; from Mr. Clay 400$; for Montezuma, 250$, from Ridgley; and probably some other
130 items of which I have no advice, amounting together to at least 3,000$. Now, I know of nothing that he has paid unless it was $500 towards Ann's house, and the 200$ to you. From this calculation he must have, at least, of my money in his hands. I did not go into this calculation . It is to prove to you that I had placed ample your different projects. It has struck me that

like to receive money through Henry, & sooner his domineering temper you would prefer go a snail's pace, or not move at all.

If I am right, tell me so candidly. Henry will never hear of it, and I will supply you from here; and, by way of beginning, I now annex you a check *in* the Merchants' Bank of Baltimore for five hundred dollars, which I charged to your account. In answer, tell me to a cent what you have received from Henry, in order that I may give him credit for the amount. Moses wrote lately that you thought the mill-foundation should be taken down, and a new one built on a larger scale, as you contemplated to attach an oil-mill to the machinery. He seemed to sneer at your sun-flower-seed oil. I replied to him
131 that I thought they all meddled too much with you & your plans; to let you alone. If you thought proper to tear down the foundation, or anything else, nobody has a right to say a word about it. He seems to have taken me at my word, for, in reply to some inquiries about you in his letter, 1st inst., he says he knows nothing about your business. So much the better. Therefore, as I cannot hear from any other source, you must write me from time to time. Tell me how you get on, and the money to carry out all your plans shall be sent to you from me, here, as fast as they are wanted, though it is a little hard to have to supply double means for the same object. This, however, I mean, in some measure, to remedy by directing Henry to deposit all money he receives on my account in the Merchants' Bank, at Baltimore, and if he offers you any money, unless it is done in a proper way, decline it.

Now, I want to tell you something about myself. I have just come down from Golden Grove, where I have
the last month, and shall return there to-morrow. { Words torn off here.
132 If a year has elapsed since I have been in
have worked like a beaver, and have { Words torn off in original.
my labour has not been lost. I fortune
being safe; and, finally, I will bring the estate out much better than could be expected. I have been compelled not only to be industrious, but in some cases, at least, persevering, if not hard, on debtors. As to what is called society and pleasure, they are both strangers to me.

In the nine months I have been in Louisiana, four of them have been passed on the plantation; and, during that time, I can truly say I have never been off the place, not having stepped over my own boundaries for a single moment. I soon gave it out that I wished no company—no calls, unless on business. Some of those, however, who thought, from their fortune and style of living, that they must call and pay their respects, came, and was polite; but their visits were never returned, and all acquaintance at an end. Ignorant fools abuse me—say I am aristocratic; others that I am unsociable and selfish. Let them say what they please. I have no time to keep company. In the city I have never dined out of our own house, and have never made three visits. Now, what has been the result of all this? Why, my business is prosperous,
133 and I will carry through and bring matters all right, which could not have been effected [torn] the most energetical exertions. If I could only get an overseer that I had confidence in, my business now
is no more to be hired here worth his salt. They { Words torn off in original.
are all and inattention. I shall get the money
estate; at least so says Mr. James W. Some

time by , so that I shall not be much in the city. Recollect, you cannot draw this money without endorsing, drawn in your favor.

Give my love to mother. Tell

Truly, yours,

(On fourth page in original.)

The house, at Golden Grove, like all other great southern mansions, was never completed, being minius the west wing. I am now burning brick and hope, by this day 12 mos., to have said west wing with all its pillars and colonades under roof, presenting a front of 222 feet; all this I shall do with my own people & mechanics, having good bricklayers and carpenters; then I hope it will strike the fancy of some rich man, who will give me 250,000$ for it, though, if I were 25 years younger, I would not sell it; nor would I do it if I thought I had a nephew capable of taking charge of it. He might come here pure & uncorrupt, but I am sure, in a few years, would be as worthless as all those around him. The climate predisposes a man to idleness, and idleness leads to all kind of vice. I have got out an English gardener, and am making the best garden in the State; shall import from Tenn. & New York every kind of choice fruit, & try them, though many will fail from the heat of the sun; the two wings and centre building quite large enough for one person. If you owe any money, pay all demands; a man in debt is a slave; & don't allow your family to run up store accounts. Pay as you go, and don't put it in the power of a paltry shop-keeper to feel as if you were his slave, because indebted to him.

Letter No. 8. From R. D. Shepherd to Abraham Shepherd.

NEW ORLEANS, *November*, 1838.

DEAR BROTHER: I have duly received your letter of the 28th inst. with my signature to the check returned, all of which is now in order, and I hope you will call freely on Henry for four times the amount, whenever you want it, and I trust you will push your business on as fast as possible. If it does cost a few hundred dollars more, it is of
135 no consequence, when compared with the time you are losing. I would therefore hire at once all the aid I wanted, and prepare the materials without loss of time. Ann shall have full justice done her. Every cent that it was the intention of our late brother to leave her, she shall receive if it comes out of my own pocket. You know I thought James had rather cut her off by leaving her only 5,000$, and in my arrangements I had doubled the amount, but since what has taken place, and being obliged to alter my arrangements any how, I shall see that all her rights are taken care of, according to the wording and meaning of the sealed letter. I do not think there is any occasion to mention the matter to mother at all, or that any further notice is taken of the subject. I am pleased to hear that Henry handed you my letters, and that you advised Mr. Clay and Messrs. Bacon & Co., of the departure of the stock. Not having heard a word from Henry on the subject, I had become very uneasy, but now I see all is right, so far as human agency can make it so. I fear when they arrive at Wheeling, they will find the river too low to descend, and may be detained there for a good
136 stage of water. You will recollect, when I first came out here, I was disgusted with the country and sugar-planting, and wrote you that I would sell, as soon as I could. The plantation was offered for sale, and I had many applicants; but the moment it was found that this estate

was incumbered with the Union Bank, and mortgaged to that institution for 2,000 shares of its stock, (say 200,000$,) and that consequently the stock and plantation must go together; purchasers objected in toto or depreciated its value in consequence of its connection with the bank, which has been badly managed, and is in bad odour. Finding this to be the case, I withdrew the place from the market; answered all applicants that came to see it with the view of purchasing that the plantation was not for sale; that I had determined to make it my home & residence, and that money could not buy it; indeed, it is the only thing I could do; and now by the sweat of my brow I have gone to work in good earnest, and if my life is spared for a few years I shall relieve the estate from all its liabilities to the bank, & then sell or give away the stock, in order to seperate the plantation from the bank. If I can lay my hands on the charter
137 of one of those real-estate banks, as they are called, I will send it to you in order that you may understand the plan of getting foreign capital here. In the meantime will explain, as briefly as I can, what a real-estate bank is. Ten years ago the legislature of this State saw the necessity of introducing a large cash capital into the State for the purpose of facilitating the great and growing agricultural as well as commercial interest of the State. Since that time they have chartered three banks with a capital of 20,000,000—say twenty millions of dollars to be subscribed for by owners of real estate; for instance, Golden Grove was valued by appraisers, appointed by the legislature, @ $200,000, the proprietor, therefore, had the right of subscribing to one of these banks for $200,000 worth of stock, to secure which he must mortgage his estate; the subscriptions being full the bank issues their bonds, payable in twenty years, bearing an interest of 6 p'r c't. The State, by act of legislature guarrantees their bonds, when they are sent to London & then sold, the money brought here, put into the bank and opperations commenced. Now this one went on most beautifully. The stock
138 rose and was in great demand, & the owners of it *was* flattering themselves that, at the end of the 20 years, their whole amount of stock would be clear without advancing one cent, having put in their property instead of money; but 18 mo's ago the great crisis came. The eyes of the stockholders were opened when our poor brother went into one of these banks and was astonished to find it had been managed by a set of directors who were nothing but a set of wild speculators; had taken out of the bank, on their own personal security, immense amounts and laid it out in wild lands, swamp lots, and new cities. This has, of course, put the stock down. Nobody has any confidence in it, and my great desire is now to get clear of this connection & relieve the plantation from mortgage. My rel*y*ance is my ships and my crops from the estate; with the former last year I have been very successful; with the latter I am sure I can make it do much better than it has ever done before. Poor James had so many other matters to attend to that he left this place under the management of incompetent persons; hence but little revenue has ever been derived from it. Moses was not equal to the task, and Mr. Gerhorn is no better; indeed, I believe no
139 good man is to be hired here at all. As I am determined to push matters on this estate, and shall probably never part with it during my life-time, I think the sooner you send me out one of your sons the better. I must have somebody there in whom I have confidence. In the two men now there I have none, and people tell me if I send them away I shall only do worse. My determination, therefore, is to have nobody. I shall give Mr. Gerhorn his walking-ticket the moment his year is up; and have formed a set of rules & regulations for the

government of overseer & slaves, very strict, and will engage no overseer unless he agrees to conform to them. Under those circumstances I may, in a short time, find myself without any white man except myself on the place. To guard such an event I think you had better dispatch Frank to me at once; and, for fear the Ohio will be closed, let him go down to Baltimore and come out in one of the first vessels sailing from that port. Henry had better go down and, with the assistance of Mr. Brooks and Mr. Harrison, ship him off. On his arrival here let him go to my banking-house, No. 84 Canal street. Mr. Lee will hand him over to Mr. Touro, who will send him up to the plantation,
140 if I *if I* should not be here, Henry will furnish the necessary money to fit him out. Now, I do not wish you to do this unless Frank is anxious to come, and unless he has made up his mind to live like a hermit and work like a horse. Keep James at school, and in a year or two I will take him also, & if there is anything in these two boys I will get it out of them. To make Frank's place good with you, hire or buy as you please, and call on Henry or on me for money. I forgot in my last to mention that I wished you take all the clothing I sent you belonging to our deceased brother and use in your own family. I am pleased that you like Mr. Everett's inscription. Ellen writes me that she will send the original in Mr. Everett's hand-writing, together with his note to grandmother, believing it would be agre'able to the family to have such testimony of the opinions of a great man. I am now here attending our great law-suit against the city for forcibly stopping our saw-mills, and have sued them for 100,000$ damages. As to justice in such a case we cannot expect it; the cry is they are rich and the public convenience requires it. I have the prospect
141 of making the best crop of sugar that was ever made on Golden Grove. My crop of corn is three thousand barrels more than was ever made on that place, say 10,000 b'ls; and if we have no early frost, I shall make 500 hhds. sugar, which is doing well. Having been so successful with my ships last year, I have sold the most indifferent one and am building a new one of 650 tons, at Boston, under the superintendence of one of my late captains; this ship will cost 50,000$, and I shall call her the James H. Shepherd. So you see in my old days I am branching out. The truth is I feel in the full enjoyment of all my faculties. I am as active as I ever was. As this cannot now last long, I must make hay while the sun shines, for the purpose of leaving my worldly affairs in such order that they will not give trouble to those who come after me. 18 mo's ago they were exactly in that situation. I had three ships, worth 100,000$, and a cash capital of over 100,000$ more to carry on business. It was lucky I had the latter, as it served a good turn in winding up my late bro.'s concerns. My object now is, to release Golden Grove from the bank, then I shall feel as if the place belonged to me, and then if I wished to sell, a good price could be obtained.
142 I most deeply regret to hear of the death of poor Ronyout. He filled his station in life well; is therefore a loss to the community. I hope his son & Bazill will get on well with the cows. Henry is silent about his racers. I am afraid he got thrashed.

Truly yours,
(Signed) R. D. SHEPHERD.

Letter No. 9. From R. D. Shepherd to Abraham Shepherd.

GOLDEN GROVE, 4*th December*, 1838.

DEAR BROTHER: I have received your letter of the 14th ultimo, and am a good deal annoyed at its contents. Bazil should have remained

with the cattle to have taken care of them; and Henry should have given him a good scolding, (better it would have been a flogging,) and sent him directly back, as I am sure there has not been one month of December for the last fifty years that the Ohio has not been navigable; and had the silly boy who had charge left Bazil with orders to put them on board the first boat for Louisville, they would have been there almost as soon as he got back to Shepherdstown. No less than five boats have passed my door within the last 48 hours from Louisville,
143 and I was looking out expecting the cattle every hour, when I received your letter. The Ohio was in fine boating order on the 25th ultimo, and if that rise is not availed of, I may not see my cows until next spring, as the ice will close the navigation in the course of this month in all probability. There will be no necessity of Tho's Vouzont returning to Wheeling. McGood will ship the cows for Louisville, and then Messrs. W. H. Bacon & Co. will take care of them, and in their hands there will be no more blundering. All that will be necessary is for Bazil to be with the cattle to feed and take care of them all the way from Wheeling to this place,& at Louisville to be governed by the orders and directions of Messers. Bacon & Co. If Henry dispatched Bazil at once back to Wheeling, all will yet be well; but if he has delayed to do this, to waite to hear from McGood or Moses it may be too late. Surely if the river was high enough to induce Moses to set out there could be no necessity to wait to hear from him before sending Bazille back, and still less for Tho's Vouzont to return at all. I still hope a little reflection will put Henry's ideas in the right train, and that I shall soon hear that Bazil went back to Wheeling with Moses. If so, all
144 will be well; if not, the whole concern will be a stupid, blundering affair. I also had a hope that my last letter, written to you in the early part of last month (I fear without date) will reach you before Moses gets out, & that you will send your son Frank out with him, being such a favorable opportunity; or if he (Moses) should have left, that Frank will come with Bazil, for, as I wrote you, I am in such a situation with both of my overseers, that if Frank was now here, I would send them both about their business the moment the crop is taken off, which I hope will be in less than two weeks. I have now been five weeks making sugar, and have gone on well as any estate in the country, and have the pleasure to tell you that I shall probably make the largest crop that was ever made on this estate. It is one of great value, but has ever been under most wretched management. Poor James was not here two months in the twelve, and when his back was turned every thing was neglected, and how he could have kept such a manager as William Graham on the place for the last 15 years astonishes me. No wonder the place has been unproductive. They have heretofore thought 400 hhds. sugar a full and large crop. I think
145 this year I shall make 500; and, if my life is spared a few years, my calculation is, that it will never be less than that, and if a favorable year, I will bring it up to 800. As I wrote you, I have altered my will, and have ordered the one left in Baltimore, of which you saw a rough draft, to be destroyed. There would have been difficulties in carrying that will into effect, depending on so many contingencies. I now have one made more to my mind, and if your two boys, Frank and James, come out and live five or six years, to see how they turn out, I may again change. In any event you, personally, and your family will be satisfied. I have put Ann & Lee's down to the letter, as expressed in the sealed note left by our lamented brother; and Ann can have her money whenever she wants it. Some has already beene paid by Henry,

& I believe more is to be paid in April. Say to Henry that I wish him to be very particular in taking receipts from Ann for all *moneys* paid to her on my account, stating in each receipt that the same is on account of a wish expressed by our late brother. A certain sum should be paid to her out of his estate willed to me. You may show this letter to
146 Henry. I wish its contents to remain with him & you alone. I have just loaded a vessel for Baltimore with a part of my crop. She leaves here to-day with a full cargo, and I have put on board of her, consigned to Mr. W. G. Harrison, two bbls. sugar & two barrels of molasses, which I send to mother for her to distribute amongst the family in such proportions as she may think proper, taking the numbers of each as a basis. Of course your portion will be a large one. I now repeat my wish that you keep your son James at school as much as possible, and when he writes a good hand and perfect in arithmetic as far as the rule of three, send him to me, that I may put him to work. If those two boys are worth a cent, I will make men of them. Keep him practising writing at home as much as you can, and send Frank out at once. If not already done, via Weeling, let him go to Baltimore, and come out by sea in the first vessel; and, to supply his place, hire or buy hands, as many as you wish, as his services to me will pay all you want in that way, and I advise you to make your force stronger than it ever has been, in order that your improvements may progress
147 rapidly. I have sent to Baltimore two boxes containing the pictures of all the ships I ever built & owned, except two; and them I will also procure and send as a present to mother, which I request she will have hung up in her parlor as a memento of my labor. By these vessels our fortunes have been principally made. They are most rough specimens, given to me by my captain, who had them painted in foreign countries where they have traded, and intended for my counting-house; but as I now do not consider myself a merchant, I send them to my family that their children may see what industry will accomplish. All these vessels, except three, have been lost, worn out, or sold. When the new ship Ja's H. Shepherd is built, I will have her painted and also sent, to be put with the rest.

No. 10. From R. D. Shepherd to Edmund I. Lee.

BOSTON, *August* 11, 1839.

DEAR SIR: I was disappointed in not having the pleasure of seeing you during my last visit to Shepherdstown. Independent of the
148 pleasure of shaking you by the hand, I was desirous of having some conversation with you respecting Charles & Ellen. You are aware that those children have some claim on me in behalf of their mother. Through her late brother, J. H. Shepherd, and agreeably to a request made of me, they are fully provided for in my will for the exact sum named as a legacy to their mother. Now it has occurred to me that this money can in no way be so well disposed of as in the education of the two children; and what I have to propose to you is, that you will at once place them at proper schools to receive such educations as you desire to give them. If you intend Charles for one of the learned professions, he should at once commence his preparations for college. If for general business, he should be sent from home to a first-rate school. Mr. Dangerfield told me the other day that Ellen was most admirably situated for the present.

I enclose you a circular from one of the very best schools in the neighborhood. If you have any idea of placing Charles north of

Mason's & Dixon's line, I think you would find no place more suitable. You may, however, prefer to have him nearer
149 home. Should you, however, have a preference for the North, and place him anywhere in the neighborhood, Mr. & Mrs. Brooks will with much pleasure look after him. They always pass their summers at Medford, five miles from this place, & probably after next winter will come to Boston to live altogether. I do not believe that I shall have time to hear from you in answer to this letter, as I shall leave here on my return home, by the way of the lakes, the latter end of this month. This, however, makes no difference, as the placing of the childre*d* is a thing that must be left entirely to yourself. My part of the business is merely to pay the bills, which I will do, and charge the amount to the legacy left to their mother by their uncle. All I wish to know is, what the amount per annum will be, and it shall be punctually remitted to any point where it is required. If you should determine on placing Charles anywhere, I think it had better be done at once, and I hope your time will permit you to accompany him, so that you can see and judge for yourself. If you drop me a line by return of mail, to the care of Messrs. Thriving & Perkins, Boston, it may still find me here.
150 I am truly, y'rs,
(Signed) R. D. SHEPHERD.

My opinion of Mr. Wells' school is, that it is a very fine one for the preparation of boys intended to enter Cambridge Colle*d*ge. Unless I intended the pupil to go through that university, I should not give the school a decided preference over some others.

Letter No. 13. From R. D. Shepherd to Abraham Shepherd.

GOLDEN GROVE, 1*st Sep.*, 1840.

DEAR BROTHER: I have received your letter of the 25th July, and observe you think I have been too hasty, and have done you injustice by taking up your case on ex-parte testimony, and by a summary process have arraigned, condemned, & executed. In answer to this, I have only to say, I have treated you in this respect, as I do all with whom I have business transactions; that is, never to receive excuses for the omission of doing anything that my own judgment tells me might have been done. I have acted on this principle through life, and have
151 invariably found I have been right. There is no use in going into particulars in your case, nor do I find any fault. I would, however, recommend that James be immediately brought home, and put to school and kept there, without missing a single day. I conceive there is a great difference in his being in Mr. Cooker's store in town, or in a trifling store in this country, probably not much above the capacity of a grog-shop. Had you informed me at once that you could not place him as was agreed upon, I would then have urged his being kept regularly at school, and if that was not done, I might have suggested his being sent to New England for a couple of years, or some other steps taken to qualify him to make his way in the world. In candour, I must say that I have no confidence in anything being done for the boy so long as he is at home. How could you allow him to remain all last fall & winter without going to school? Here was six months of most precious time thrown away. It is, however, not for me to say what must be done. I shall have pleasure in co-opperating with you in any measures for
152 his advantage that I may approve of, & that you may suggest, and you will perceive my ideas in the preceding part of this let-

ter, a portion of which I repeat, viz: If you cannot have him placed in Cooker's or Webb's store, in town, take him home immediately, and send him to school; but no use in doing this unless he goes there constantly, and applys himself to his studys when there. Being immediately under your own eye, you could judge of his progress; and if he does not get on well, I will, with your permission, send him to some part of New England, though I should much prefer if he could be qualified at home, which he certainly could be, if you would give him proper attention. You surely cannot forget the care, trouble, and anxiety that our father & mother had for you & me at his age. The only flogging my father ever gave me in his life was for playing truant. He watched me daily, so that his vigilance could not be evaded, by which means, @ 15 years of age, I was qualified to go into a counting-house. Our parents set us an example that I am free to say all their children have not emulated. More shame for them.

If you would have liked to have taken an excursion into the
153 mountains, why in the deuce did you not do so? Your reasons for not indulging your inclination does not appear to me to be good, and I cannot help but smile when I hear you speak of the groans of distress resounding through the land, admonishes you to stay at home. Those groans, depend upon it, proceed from none but the improvident, the indolent, & the politician—the latter at this moment probably making more noise to humbug the people. A change of rulers, be assured, will not better the circumstances of all the wild speculators and the vast number who lived extravagantly by their wits, & who will not work. Of this description our country is overrun. They have sprung up under the banking & abused credit system; and it matters not who has the reins of government, we must work more, spend less, and time will bring all right. An immense amount of the present indebtedness of both corporations, individuals & even States, must be liquidated by bankruptcy; and I am perfectly satisfied in my own mind that the course of the administration is the true one for the interest of the country, that is, the great leading objects: The sub-treasury; their hostility to all corporations, especially banks; their militia bill; internal improvements, &c., &c. On the other hand, I detest and abhor their practice as a
154 party: That to the victor belongs the spoils; and the miserable wretches they appoint to office, having no other qualification under heaven but that of being an active partisan. So I find nearly as much to condemn as approve, which keeps me aloof from politicks and causes me not to care a fig who is elected. I shall not vote for either Mr. Van Buren or Gen'l Harrison; though, were I obliged to do so, I should certainly prefer Mr. Van Buren. And by the way of conclusion, mark my word for it, if Gen'l Harrison is elected we shall not get along as well as we do now. We suffer here also from drought. My ca*in* in consequence looks miserable, and I shall not make more than one-half of what I expected. I thank God for that, and am content.

I do not wish to be too inquisitive or ask improper questions, but my arrangements makes it necessary that I should know to a dollar your situation. I wish you, therefore, to send me a list of every cent in the world you owe and to whom it is due; and, if you think proper, I wish to be furnished with this information as soon as possible. I put this letter with one for Moses in our parish post office. Note the day
155 it gets to hand; but direct to me as usual at N. Orleans.

Truly yours,

(Signed) R. D. SHEPHERD.

Letter No. . From R. D. Shepherd to E. I. Lee, esq.

NEW ORLEANS, 24*th April*, 1844.

MY DEAR SIR: I received your letter of the 12th inst., and annexed above you have my check on the Merchants' Bank in Balt'o., for 150$, say one hundred & fifty dollars for the payment of Charles' quarter' bill. I learn from your letter, with much pleasure, that Ellen is about to settle herself in life, and I hope the step she is about to take may tend to her future happiness & welfare.

In answer to your inquiries respecting the expectations of your children my late brother's estate, I have only to say that, at the time of his death, in 1837, he supposed himself to be wealthy, as thousands of others did who have lived since to see themselves ruined & bankrupt. He was, however, aware that there was a crisis in the commercial world at hand that would shake it to its very foundation; and his own affairs being much extended, he had doubts as to the result, (mine were much greater than his;) & as he was heavily indebted to me, it was
156 agreed between us, some 12 or 15 years since, that he should make his will as he did, for my security, he leaving a private letter addressed to me, telling me how he wished his property disposed of at my death, directing that 5,000$ should be given to each of his sisters. Knowing that Mrs. Hammon was poor, I paid her that amount some four years ago, and at same time proposed to you to advance any money necessary for the education of your two children, as the best mode by which a similar sum to that given to Mr. Hammond could be expended. My brother's estate has wound up with immense losses, two of the largest debtors having failed and become bankrupt, and had he lived until this day it would have been only to have found himself utterly ruined. I saw this some years before his death, and had determined to come out here to reside before he died, fearing of becoming involved in the wreck that has followed, and at some time to endeavor by my influence to withdraw him from the heavy speculations in which he was engaged. To my horror, on my arrival here in 1837, I found his indebtedness over half a million of dollars, & he was involved as endorser for others for more than half that amount. He did not have a particle of
157 property that was not mortgaged up to the hub, as the saying is. I was most seriously alarmed, and passed many a sleepless night, and I believe would have given all up as lost, including my own ruin, had it not been for that inestimable friend, Judah Touro, who came to my aid with all his force and power; and I have finally got through, and here I am with a large amount of real estate, so much depreciated in value that I am confident it would not fetch the amount of cash I have paid to release it from the mortgages with which it was encumbered. Notwithstanding all these facts I am ready to pay over to your two children the moment they become of lawful age any balance, after deducting the amount that has been advanced by me for their education.

I am much obliged to Ellen for her kind invitation to attend her wedding. Society and I have long since taken leave of each other. She must therefore excuse me, as I go no where, and am now too old to make new acquaintances or to keep up much intercourse with old ones.

I am very truly yours,

R. D. SHEPHERD.

I was duly apprised of the deposit of $300 by you in the Mer-
158 chant's Bank, which has gone to the credit of C. M. L., and he long since advised of the same.

To E. I. LEE, Esq'r.

The certificate attached to the last leaf of the foregoing letters, is in the words and figures following:

Certificate.

We, the undersigned, have carefully compared the letters of R. D. Shepherd, of which the pages to which this is connected, being in all forty-six, marked with the initials of J. P. A. Eutler, which initials we saw him place thereon, with the copies contained in said forty-six pages, and pronounce these copies correct copies of the originals which were all in the handwriting of said R. D. Shepherd, with whose handwriting we are well acquainted.

Shepherdstown, W. Virginia, February 2d, eighteen hundred and sixty-seven.

A. R. BOTELER.
JNO. REYNOLDS.
WILLIAM BORDIN.
J. P. A. EUTLER.
JACOB TERREL.

Ans. The initials "J. P. A. E." are in my handwriting. The
159 said certificate was signed by me, and the facts stated therein are true, to the best of my knowledge and belief.

Ques. Where do you reside?

Ans. In Shepherdstown, Jefferson County, West Virginia.

And further this deponent saith not.

J. P. A. EUTLER.

Deposition of I. Thomas Chapline.

I. THOMAS CHAPLINE, a witness of lawful age, being first duly sworn, deposes and says:

Ques. State where you reside, and where the last witness, James H. Shepherd, resides?

Ans. Both of us reside in Shepherdstown, Jefferson County, W. Va.

Ques. State whether you had any conversation or heard any conversation with, or heard Mr. R. D. Shepherd make any statement in regard to the Lucas farm a short time before his death; if so, state what he said?

160 Ans. I had a conversation with him. He made certain statements about it and spoke of Dr. Rob't A. Lucas in rather an unkind manner. He remarked to me that he had bought that farm and given it to Mrs. Lucas, his niece.

And further this deponent saith not.

I. THOMAS CHAPLINE.

Deposition of A. R. Boteler.

A. R. BOTELER, a witness of lawful age, being first duly sworn, deposes and says:

Ques. Where do you reside?

Ans. In Shepherdstown, Jeff. Co., W. Va.

Ques. Examine paper shown you, marked "C," and state what it is a copy of, and in whose handwriting the original letter of which it is a copy, was?

(Which paper, marked "C," is the same paper heretofore referred to in the deposition of "J. P. A. Eutler as a paper marked "C.")

Ans. It is a copy of a letter of Mr. R. D. Shepherd's to his brother Abraham. The original letter of which it was a copy was in
161 R. D. Shepherd's handwriting.

Ques. State whether or not you were familliar with the handwriting of R. D. Shepherd, and whether or not the certificate on page 4 of Paper "C," signed by you, is correct.

Ans. I am familiar with the handwriting of R. D. Shepherd. Said certificate is signed by me, and is correct.

Question. Examine the writing shown you, marked "D," and each leaf thereof, and say whether the initials "J. P. A. E.," on each leaf are in the handwriting of Mr. J. P. A. Eutler, and whether the certificate attached thereto on the last leaf was signed by you, and whether or not the facts stated in said certificate are true.

(Which writing, marked "D," with the initials "J. P. A. E." on each leaf thereof, is the same heretofore referred to in like manner in the deposition of J. P. A. Eutler as a writing marked "D," &c.)

Ans. The initials are in the handwriting of Mr. J. P. A. Eutler, and the certificate is signed by me, and the facts therein stated are correct.

Ques. State what was the character of Mr. R. D. Shepherd—whether mild or *p*reremptory, easily dictated to or dictatorial.

Ans. It was decidedly dictatorial and *p*reremptory.

Cross-examination:

Ques. Where are the original letters of which these are said to be copies?

Ans. I do not know.

Ques. Where did you see the original letters at the time you compared them with these copies?

162 Ans. In the office of Dr. John Briscoe, in this town.

Ques. For what purpose and object was the certificate placed upon the back of these copies, which has to it, among other things, your signature?

Ans. To verify their authenticity.

Ques. Was it to be used in any suit pending between any of the parties interested in the estate of R. D. Shepherd; and, if so, when was such suit pending?

Ans. I understood that it was to be used in such a suit pending in New Orleans with R. D. Shepherd's estate.

Ques. Can you say whether that suit is still pending and undetermined?

(Question excepted to.)

Ans. I have not heard of any final decision in it.

(Answer excepted to.)

And further this deponent saith not.

A. R. BOTELER.

Deposition of Moses Whiting.

MOSES WHITING, a witness of lawful age, being first duly sworn, deposes and says:

Ques. Where do you live?

Ans. At Mr. E. I. Lee's, near Shepherdstown, Jeff. Co., W. Va.

163 Ques. Whether you ever heard Mr. Rezin D. Shepherd say anything about the "Lucas farm?" State what he said.

Ans. Yes, sir; I have. He said he intended it for Mrs. Catharine Lucas. He wanted her to live there her life-time. He wanted it for her and her children for a home for them. He did not intend to leave it so Mr. Lucas could have anything to do with it; that it was left all in her hands, and he intended helping her all he could to get her a good home, and satisfy her.

Cross-examination:

Ques. When was it that you heard Mr. Rezin D. Shepherd make these remarks?

Ans. I couldn't exactly tell the day or month, but it was along before the war, and during the beginning of the war.

And further this deponent saith not.

his
MOSES + WHITING.
mark.

Attest:

GEO. M. BELTZHOOVER, *U. S. Com'r.*

To which the plaintiffs objected, and the court sustained said objections so far as they tend to prove that Catharine Lucas derived title to the property in controversey under the will of R. D. Shepherd, and so far as they refer to conversations and other verbal statements held between the said witnesses and R. D. Shepherd concerning his pur-
164 poses as to said farm; to which ruling of the court the defendant excepts, &c.

And thereupon the defendant offered in evidence a letter bearing even date with the will of said R. D. Shepherd, written by him, the said R. D. Shepherd, addressed to Ellen Brooks, Peter C. Brooks, jr., and Shepherd Brooks, in the words and figures following:

Letter of R. D. Shepherd to E. & P. C. & S. Brooks.—(*Marked* "19.")

WILD GOOSE FARM, JEFFERSON CO., VIRGINIA,
1*st September*, 1859.

To my daughter Ellen Brooks and her sons P. C. Brooks, jr., and Shepherd Brooks, now residents of the State of Massachusetts:

I have this day made my will, in original and duplicate, one copy with this letter deposited with you in Boston. The other will be found amongst my papers here. I leave you a very large unencumbered property, (productive,) and no legacies to be paid; but write this letter for your information and government, so far only as you may see fit to carry out my present views and wishes. Circumstances frequently change, so as to make what was proper and expedient at one time the reverse at another time. I therefore rely on your doing what is
165 right, keeping in view what you believe my wishes would be were I living. The balance-sheets of my books will point out the property. You are aware that both Mr. Touro and my brother James made wills and left me their residuary legatee. My brother, at the time of his death, owed me a large sum of money, and in order to secure and induce me to raise the mortgage I held on his property, so that he might borrow more money on it, he made his will in the manner he did, for the purpose of securing more effectually my debt. It was an understanding between us. When he died in 1837 he left his affairs much extended and at a time of great commercial embarrassment, remembered

by many down to the present day. His debts and liabilities at the time of his death exceeded half a million dollars, a frightful sum for a man to owe at that time, when confidence between man and man was generally destroy', and property of all kinds depreciated in value one-half. I went to New Orleans, probated his will, assumed his debt, took possession of his property as his residuary legatee, and by the aid of my noble old friend Judah Touro, after a number of years of toil and anxiety, worked through and saved myself from ruin. In the assetts of my brother's estate there were many bad debts, two in particular of large amounts:
166 a man by the name of Diggs, the other John F. Miller; both these men took the benefit of that disgraceful bankrupt law passed by the General Government in 1838. These los'es dwindled down my brother's estate to almost nothing, and would have left him in hopeless bankruptcy, had it been managed in the usual way.

As regards Mr. Touro's estate, after paying the numerous and large legacies left by his will, the account finally settled by his executors and filed in the probate court in New Orleans, shows a balance in my favor of $140,000, the executors having sold and credited on this account nearly all the property, leaving nothing of any great value, except the property in Canal st., the greater part of which was unproductively improved by ordinary buildings. I have kept this property and improved it at a very heavy outlay. I have besides paid upwards of $50,000 given to various persons not named in Mr. Touro's will as legatees, but sums of moneys he verbally requested me to give. Their names and the amounts given to each, with receipts, will be found amongst my papers in New Orleans. Besides these items, I have agreed to pay $50,000 towards the completing Touro Alms-House in New Or-
167 leans and I have donated the land on which it is built which I value at $40,000. It is not true that either Mr. Touro or my brother James made any request or expressed any wish as to the disposition of any money or property coming to me, as their residuary legatee, that has not been most strictly complied with, and means of my own have been added for that purpose. I mention these facts as there is an impression in certain quarters that I have inherited a large fortune from those estates. There is not one word of truth in it. When I get through I will have paid more than I have received. My fortune has been made by own efforts, industry, and economy, and has more than doubled in the last few years by fortunate investments and the wonderful prosperity of the country, which I am afraid is too great and good to last. I take very little interest in any of my family connections here, except Henry Shepherd, j'r, and J. H. Shepherd, my two nephews; for all the others, of both sexes, I have done as much as I ever wish done for them, and more than some of them deserve. Should ever Henry or James require aid or assistance, give it to them in such way as you may deem best.

I am sadly puzzled to know what to do to this farm, and
168 the slaves thereon, now amounting to twenty-five in number, young and old, more than half children; therefore leave it entirely to you. I would, under my present state of feelings, prefer giving up this plantation for a home and the benefit of my slaves in preference to give it to any of my connections here.

I therefore wish you would make the experiment for a year or two and see how the matter would work by putting a good steady white man to manage all things pertaining to the plantation. If they can support themselves, and keep the place in good order, well and good. If not, dispose of the whole concern in any way you may think best.

If any of the negroes wish to go to Liberia, let them go, giving them an outfit. If they wish to change masters and live here, let them go at a low price. In a word, do what you think for the best, bearing in mind that those poor slaves stand as high in my estimation and regard as any relation I have here, and much higher than $\frac{9}{10}$ of them, and I should prefer that this property should be used for their benefit in preference to any body else except yourselves.

169 I now hold a note of $11,000 of Capt. Hamilton taken from him in payment of $\frac{1}{4}$ of the ship Montgomery. From the day he purchased his interest in the ship to the present time the shipping interest has been in a most depressed state, and his ship, during that time, has not paid her running expenses and has become much depreciated in her value, without any blame whatever attaching to Capt. Hamilton. As a token of my regard for him, I direct that whatever balance may be due to me on this note, or any other note of his that I may hold at the time of my death, be given up to him and he released from the payment of the same; and, as I take an interest in his welfare, I request that, in case of poverty or misfortune to him or any of his family, give them aid or assistance, always providing they are in every way deserving. The best way to befriend Capt. Hamilton, while he is young and capable, is to enable him to command and own a part in a good freighting ship; and it is my opinion the day is not far off when property in shipping will again become a most profitable investment. It is therefore my intention to sell the ship Montgomery, as soon as a fair price can be obtained for her, and build a new one, giving to Capt. Hamilton an interest it her, as well as the command, in which case she shall be called the Alexander Hamilton, by far the

170 greatest man, as a statesman. At the time of the foundation of this Government, had his ideas of a government been listened to, we would now be living under a strong one, and not under a rope of sand as handed down to us by Jefferson and his party.

I have commenced some buildings and improvements in Shepherdstown for public uses—a town hall and library in one building on the spot where I was born; also, a school-house, which I hope to see completed. If not, you will carry out my plans, but make no conveyance of the property, but keep a control over it by being the owner. Town aldermen and schoolmasters often become refractory and must be kept in their place by keeping the staff in your own hands.

I wish you to give Mr. S. C. Thiving some suitable token of my regard for him. He has been for forty years the best and most faithful agent I ever had.

It is my desire that my funeral be strictly private, and wish no one to follow me to the grave but yourselves and all my slaves, old and young; and each of them be provided with a full suit of mourning of the best quality, according to their ages; and that I be buried in our

171 family ground in Shepherdstown, the spot there being marked out near to my father and mother and alongside of my brother James.

As to the plantation in this county belonging to me, and known as the Lucas farm, allow Catharine Lucas, my neice, to live upon it during her life-time, on the condition that she pay you a small rent of 3 or 4 per ct. on its cost, which is $24,000, but don't sell it unless you get the cost. Then give my said neice $10,000 out of the proceeds, well secured on her children.

Recommending you to our Heavenly Father who has, in the most special manner, favored me through life, and to whom, with my last

breath, I hope to express my love and veneration and gratitude, *and* I am your ever affectionate and loving father,

(Signed) R. D. SHEPHERD.

True copy.
Test: (Signed) JAMES R. BREWER, *Clerk.*

Which the court permitted to be read in evidence only for the purpose of showing the intentions of the executors in executing the lease to Catherine S. Lucas; to which opinion of the court confirming said letter to the purpose aforesaid the defendant excepts, &c.

172 And thereupon the defendant proposed to offer in evidence the transcript of a record from the circuit court of Jefferson County, West Virginia, in forcible detainer, wherein Peter C. Brooks, jr., was plaintiff, and Robert A. Lucas was defendant, which is hereto annexed, marked "P," and made part hereof, in the words and figures following:

Transcript of record.—(Marked "P.")

P. C. BROOKS, JR., *vs.* R. A. LUCAS.

Be it remembered that among the record of proceedings of the circuit court of Jefferson County will be found the following:

BOSTON, MASS., *March* 16, 1867.

Mrs. C. S. LUCAS.

MADAM: According to the proposition made to you Nov'r 29, 1865, and accepted by you December 11, 1865, concerning the lease of the farm occupied by you in Jefferson County, West Virginia, it was agreed that we should notify you a year in advance of any change to be made in regard to the lease.

You are hereby notified that your lease of the said property will expire in one year from the first day of April next, and that you
173 will be required to surrender possession of the premises and remove therefrom on the first day of April, 1868.

Your rent of $600 for the year ending April 1st, 1868, will be due January 1st, 1868.

Your obed't servant,

SHEPHERD BROOKS.

PETER C. BROOKS, JR., PLAINTIFF *vs.* ROBERT A. LUCAS, DEFENDANT. } Action of unlawful detainer.

West Virginia to the sheriff of Jefferson County, greeting:

We command you that you summon Robert A. Lucas, the defendant herein, to be and appear before the judge of our circuit court of Jefferson County at the court-house of said county, on Wednesday, the 15th day of April next ensuing, (1868,) to answer the action of the plaintiff, Peter C. Brooks, jr., for unlawfully withholding and detaining from him the possession of the following-described tract of land, situate, lying, and being in said county of Jefferson, and State of West

Virginia, containing two hundred and ninety-three and one-quarter acres, bounded as follows, to wit: Beginning at a stone, (1,) an original corner on the east side of the road leading from Charleston to
174 Shepherdstown, a corner to Adam Link and Selby's heirs; thence, with said heirs and John H. McEndree, north seventy-eight and one-quarter degrees west, one hundred and thirty-seven poles and five-tenths of a pole, to a stake (2) in McEndree's line, a corner to Col. Robert Lucas; thence, with his lines, south ten and one-half degrees west, one hundred and sixty-four poles, to a point (3) at or very near the southeast corner of an old still-house; thence south seventy-seven and one-half degrees, twenty poles and thirty-five one hundredths of a pole, to a large white-oak tree, (4;) thence south ten and one-half degrees west, fifty-two poles and three tenths of a pole, to a stone, (5;) thence south seventy-eight and three-quarter degrees east, thirty-seven poles and two-tenths of a pole, to three walnut trees (6) on a ridge; thence south ten and one-half degrees west, one hundred poles and eight-tenths of a pole, to a stone (7) lying on the place of a corner; thence south seventy-eight and three-quarter degrees east, ninety-five poles and six tenths of a pole, to a stone, (8;) thence south ten degrees west, sixty poles and eight-tenths of a pole, to a stone (9) lying over the place of the corner; thence south seventy nine and one-half degrees
175 east, four poles and eighty-five one hundredths of a pole, to a large heart-cherry tree, (10;) thence south ten and one-quarter degrees west, thirty-nine poles and one-tenth of a pole, to the south side of a locust post (11) on the side of a hill; and thence finally with Col. Lucas and with Mrs. Frances Lucas, south seventy-seven degrees east, thirty-six poles and eighty-five one-hundredths of a pole, to a stone (12) on Mrs F. Lucas' line and a corner to William and Tobias Hendricks; thence, with the latter and Coffinbarger, north ten and three-quarter degrees east, two hundred and eleven poles and five tenths of a pole, to a stone, (13,) a corner to Coffinbarger, in Adam Link's line; thence, with Link, north eighty-six degrees west, sixty-two poles and sixty-five one-hundredths of a pole, to a stone, (14,) marked E. L., an original corner, a corner to Link; thence, with Link, north ten and three-quarter degrees east, two hundred and thirteen poles and nine-tenths of a pole, to the beginning—against the consent of the plaintiff Peter C. Brooks, jr., to the damage of the plaintiff, $100, and have then there this writ.

Witness William A. Chapline, clerk of our said court, at the court-house the second day of April, 1868, and in the fifth year of our foundation.

W. A. CHAPLINE,
Clerk of the Circuit Court.

C. J. FAULKNER & THOMAS VAN SWEARINGEN,
Attorneys for Plaintiff.

1868. APRIL TERM.—On motion of defendant, and upon his affidavit showing cause for a continuance, it is ordered that this cause
176 be continued at defendant's costs.

1868. JUNE TERM.—On motion of the defendant, by his attorney, this cause is continued at his costs.

WEST VIRGINIA,
Jefferson County, ss:

CLERK'S OFFICE, *August 21st*, 1870.

I, William A. Chapline, clerk of the circuit court of Jefferson, do hereby certify that the foregoing is a true transcript of the record in the above-

named suit of Peter C. Brooks, jr., vs. R. A. Lucas; and I do further certify that the same is complete, except that there is on the order-book of said court the following entry in said cause, "P. C. Brooks, jr., vs. R. A. Lucas, &c., jr. On motion of the plaintiff, by his attorney, this motion is dismissed at his costs; and therefore it is considered by the court that the deft. recover his costs by him in his behalf expended;" which order completes said record.

177 Witness my hand and the seal of said court this 21st day of August, 1870.

{SEAL CIRCUIT COURT JEFFERSON CO., WEST VIRGINIA.}

W. A. CHAPLINE,
Clerk of Circuit Court Jefferson County, W. Va.

I, Joseph A. Chapline, judge of the circuit court of Jefferson, hereby certify that William A. Chapline is the clerk of the said court; that the signature to the annexed certificate is in his proper handwriting, and that his attestation is in due form of law.

JOSEPH A. CHAPLINE,
Judge of 6 Judicial Circuit, West Va.

Which was objected to by the plaintiff, whose objection was sustained by the court, and said transcript excluded from the jury; to which decision of the court the defendant excepted.

And thereupon the defendant offered in evidence two transcripts of the records of the circuit court of Jefferson county, West Virginia, of proceedings upon distress-warrants for rents issuing from the premises in controversy, which are hereto annexed, marked "Q" and "R," and made part hereof, in the words and figures following:

178 *Record.—(Marked "Q.")*

P. C. BROOKS, JR., *vs.* R. A. LUCAS, &C. } Distraint for rent.

Among the record of proceedings in the circuit court of Jefferson county, West Virginia, will be found the following, to wit:

WEST VIRGINIA,
Jefferson County, set:

This day William A. Chapline, agent for Peter C. Brooks, jr., made oath before me, James Wiley, a justice of the peace for the township of Chapline, in the county of Jefferson, & State aforesaid, that Robert A. Lucas and Catherine Lucas, his wife, his tenants, is justly indebted to & owing him, the said Peter C. Brooks, jr., the sum of ($600) six hundred doll's, with legal interest thereon from the 1st day of January, 1869, due by contract for the year ending January 1st., 1869, for rent of a tract of land lying and being in the township of Chapline, & county of Jefferson, & State aforesaid. Given under my hand this 25th day of February, 1869.

JAMES WILEY, *J. P.*

Also—

West Virginia to the sheriff of Jefferson County, greeting:

Whereas affidavit has this day been made before me, a justice of the peace for the township of Chapline, Jefferson County, and State
179 of West Va., by William A. Chapline, agent for Peter C. Brooks, jr., that there was due by Robert A. Lucas & Catherine S. Lucas,

his wife, to the said Peter C. Brooks, jun'r, on the 1st day of January, 1869, the sum of $600 for rent of a tract of land in the township of Chapline, said county, due by contract:

This is to command you, in the name & by the authority of the State of West Virginia, to levy upon any of the goods and chattels of the said Robert A. and Catherine S. Lucas which may be found upon said demised premises, and make sale of the same, or so much thereof as may be sufficient to pay and discharge the said rent of ($600) six hundred doll's, with interest from the 1st day of January, 1869, til' paid, and the costs of this proceeding. As witness my hand and seal this 25th day of February, 1869.

JAMES WILEY, *J. P.* [SEAL.]

(Endorsed:) Levied the within distress-warrant upon four head of horses and two head of cattle, the property of Robert A. Lucas, this 26th day of February, 1869, and a forthcoming bond taken.

I. THOMAS CHAPLINE, *Dep. for*
T. W. POTTERFIELD, *Sheriff.*

1869. APRIL 16TH.—Forthcoming bond filed, as follows:

180 Know all men by these presents that we, Robert A. Lucas and John Cook, are held and firmly bound unto Peter C. Brook, jr., in the sum of twelve hundred and sixty-six $\frac{33}{100}$ dollars, to be paid to the said Peter C. Brooks, jr., his executors, administrators, or assigns; for the payment whereof we bind ourselves, jointly and severally, and each of our several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 10th day of March, 1869.

The condition of the above obligation is such that whereas the said Peter C. Brooks, jr., has obtained from James Wiley, a justice of the peace in and for the township of Chapline, in the county of Jefferson, and State of West Virginia, a warrant of distress for rent against the goods and chattels of the above-bound Robert A. Lucas and Catherine S. Lucas, directed to the sheriff of said county, which warrant, with legal costs on the same, amounts to the sum of $633.10.

And whereas I. Thomas Chapline, deputy for T. W. Potterfield, sheriff of said county, by virtue of said warrant has taken the following property, to wit, four head of horses and two head of cattle belonging to the said Robert A. Lucas to satisfy the said warrant and costs; and

181 the said Robert A. Lucas, being desirous of keeping the said property in his possession until the day of sale thereof, has tendered the above-bound John Cook as his security for the forthcoming and delivery thereof on the day and at the place of sale:

Now, if the above-bound Robert A. Lucas and John Cook, or either of them, do and shall deliver the said property to the said I. Thomas Chapline, deputy for Truman W. Potterfield, sheriff as aforesaid, at the courthouse of said county, on the 1st day of the next April term of the circuit court for said county, then and there to be sold to satisfy the said warrant of distress in favor of the said Peter C. Brooks, jr., then the above obligation to be void; otherwise to remain in full force and virtue.

R. A. LUCAS. [SEAL.]
JOHN COOK. [SEAL.]

(Endorsed:) Bond forfeited and returned to clerk's office this 16th day of April, 1869.

I. THO'S CHAPLINE,
Dep. Sheriff.

1870. MARCH 8TH.—Notice of f. c. bond filed.

To R. A. LUCAS and JOHN COOK:

A bond having been executed by you to me on the 10th day of March, 1869, in the penalty of twelve hundred and sixty-six dollars and twenty cents, with a condition for the delivery of certain goods and chat-
182 tels mentioned in said bond for the satisfaction of a warrant of a distress, the amount whereof at the date of the said bond was, including legal costs on the same, six hundred and thirty-three dollars and ten cents, it was provided that, if the said R. A. Lucas and John Cook should have the said goods and chattels forthcoming on the 1st day of the next April term of the circuit court of Jefferson County, at the court-house of said county, being the day and place appointed by the sheriff, then the said obligation was to be void.

And the said R. A. Lucas and John Cook having failed to deliver the said goods and chattels according to the condition of the bond, or to pay the money mentioned in said warrant of distress, notice is hereby given to you and each of you, that, on the 1st day of the next term of the said circuit court of Jefferson County, I shall move the said court to award execution upon said bond in my behalf against you, and each of you, for principal and costs.

Given under my hand this 26th day of February, 1870.

PETER C. BROOKS,
By FAULKNER & VAN SWEARINGEN,
His Attorneys.

183 WEST VIRGINIA,
Jefferson County, ss:

CLERK'S OFFICE IN THE CIRCUIT COURT,
Aug. 20th, 1870.

I, W'm A. Chapline, clerk of said circuit court, do certify that the aforegoing & attached is a true copy of the proceedings, as will be found in said record of said court "as far as proceeded in."

The cause is not ended as yet.

Given under my hand and the seal of the s'd court on the date aforesaid.

{SEAL, CIRCUIT COURT JEFFERSON CO., WEST VIRGINIA.}

W. A. CHAPLINE,
Clerk of the Cir. Court.

I, Joseph A. Chapline, judge of the circuit court of Jefferson, hereby certify that William A. Chapline is the clerk of the said court; that the signature to the annexed certificate is in his proper handwriting, and that his attestation is in due form of law.

JOSEPH A. CHAPLINE,
Judge of the 6th Judicial District of West Virginia.

Record.—(*Marked "R."*)

P. C. BROOKS, JR.
vs.
R. A. LUCAS, &C. } Distraint for rent.

Among the record and proceedings of the circuit court of Jef-
184 ferson County, will be found the following:

WEST VIRGINIA,
Jefferson County, sct.

This day William A. Chapline, agent for Peter C. Brooks, jr., made oath before me James Wiley, a justice of the peace for the township

of Chapline, in the county of Jefferson, & State aforesaid, that Robert A. Lucas and Catharine S. Lucas, his wife, his tenants, is justly indebted to & owing him, the said Peter C. Brooks, jr., the sum of ($600,) six hundred dollars, with the legal interest thereon, from the 1st day of January, 1870, due by contract for the year ending January 1st, 1870, for rent of a tract of land lying and being in the township of Chapline, & county of Jefferson, & State aforesaid.

Given under my hand this 18th day of February, 1870.

JAMES WILEY, *Justice.* [SEAL.]

West Virginia to the sheriff of Jefferson county greeting:

Whereas, affidavit has this day been made before me, a justice of the peace for the township of Chapline, Jefferson County, and State of West Va., by William A. Chapline, agent for Peter C. Brooks, jr., that there was due by Robert A. Lucas & Catharine S. Lucas, his
185 wife, to the said Peter C. Brooks, jr., on the 1st day of January, 1870, the sum of ($600,) six hundred dollars, for rent of a tract of land in the township of Chapline, and said county, due by contracts:

This is to command you in the name and by the authority of the State of West Virginia, to levy upon any of the goods and chattels of the said Robert A. Lucas and Catherine S. Lucas, which may be found upon said demised premises, and make sale of the same, or so much thereof as may be sufficient to pay and discharge the said rent of ($600,) six hundred dollars, with interest from the 1st day of January, 1870, til' paid, and the costs of this proceeding.

As witness my hand and seal this 18th day of February, 1870.

JAMES WILEY, *Justice.* [SEAL.]

1870. APRIL 12TH.—F'c. bond filed.

Know all men by these presents that we, Robert A. Lucas, Catherine S. Lucas, John Cook, and William M. Shepherd, are held and firmly bound unto Peter C. Brooks, jr., in the sum of twelve hundred and fifty-five dollars and forty-four cents, to be paid to the said Peter C. Brooks, jr., his executors, administrators, or assigns; for the payment whereof, we bind ourselves, jointly and severally, and each of our several heirs, executors, and administrators, firmly by these presents, sealed
186 with *and* seals, and dated this 26th day of February, 1870.

The condition of the above obligation is such, that whereas the said Peter C. Brooks, jr., has obtained from said James Wiley, a justice of the peace in and for the township of Chapline, in the county of Jefferson, and State of West Virginia, a warrant of distress for rent against the goods and chattels of the above-bound Robert A Lucas & Cather- S. Lucas, directed to the *the* sheriff of said county, which warrant, with legal costs on the same, amounts to the sum of six hundred and twenty-seven dollars and seventy-two cents;

And whereas I. Thomas Chapline, deputy for J. W. Potterfield, sheriff of said county, by virtue of said warrant, has taken the following property, to wit: Four head of work-horses, ten head of cattle, and twenty head of hogs, belonging to the said Robert A. Lucas and Catherine S. Lucas, to satisfy the said warrant and costs; and the said Robert A. Lucas and Catherine S. Lucas being desirous of keeping the said property in their possession until the day of sale thereof, has tendered the above-bound John Cook, and William M. Shepherd, as their
187 sureties for the forthcoming and delivery thereof on the day and at the place of sale:

Now, if the above-bound Robert A. Lucas, Catherine S. Lucas, John Cook, and William M. Shepherd, or either of them, *and* shall deliver the said property to the said I. Thomas Chapline, deputy for T. W. Potterfield, sheriff as aforesaid, at the court-house of said county, on the first day of the next April term of the circuit court for said county, then and there to be sold to satisfy the amount mentioned in said warrant of distress in favor of the said Peter C. Brooks, jr., then the above obligation to be void; otherwise to remain in full force and virtue.

R. A. LUCAS. [SEAL.]
CATHERINE S. LUCAS. [SEAL.]
JNO. COOK. [SEAL.]
W. M. SHEPHERD. [SEAL.]

(Endorsed:) Bond forfeited and returned to clerk's office this 12th day of April, 1870.

I. THO'S CHAPLINE, *Deputy for*
T. W. POTTERFIELD, *Sh'ff.*

IN THE CLERK'S OFFICE, C. C.,
Aug. 23rd, 1870.

WEST VIRGINIA, *Jefferson County:*

I, W. A. Chapline, clerk of said circuit court, do certify that
188 the foregoing & attached is a true copy of the proceedings, as will be found in said record of said court as far as proceeded in.

The cause is not ended as yet.

SEAL, CIRCUIT COURT JEFFERSON CO., WEST VIRGINIA. Given under my hand and the seal of said court this 23rd day of August, 1870.

W. A. CHAPLINE,
Clerk of the Cir. Court J. C.

I, Joseph A. Chapline, judge of the circuit court of Jefferson, hereby certfy that William A. Chapline is the clerk of said court; that the signature to the annexed certificate is in his proper handwriting, and that his attestation is in due form of law.

JOSEPH A. CHAPLINE,
Judge of the 6th Judicial Circuit of West Va.

And thereupon the defendant proposed to offer in evidence also another transcript of a distress-warrant, and a forthcoming bond, given under the same, which is hereto annexed, marked "S," and made part hereof, in the words and figures following:

Distress-warrant & forthcoming bond.—(Marked "S.")

P. C. BROOKS, JR.,
vs.
R. A. LUCAS, &C.

189 Clerk's office of circuit court for Jeff. County, West Va.

Among the files & records of the said office for said county and State of West Virginia will be found the following, to wit:

WEST VIRGINIA,
Jefferson County, set:

This day William A. Chapline, agent for Peter C. Brooks, jr., made oath before me, James Wiley, a justice of the peace in and for the

township of Chapline, in the county of Jefferson & State aforesaid, that Robert A. Lucas and Catherine S. Lucas, his wife, his tenants, is justly indebted to and owing him, the said Peter C. Brooks, j'r, the sum of ($600,) six hundred doll's, with legal interest thereon from the 1st day of January, 1871, due by contract for the year ending January 1st, 1871, for rent of a tract of land lying and being in the township of Chapline, & county of Jefferson, & State aforesaid.

Given under my hand this 10th day of February, 1871.

JAMES WILEY,
Justice, West Virginia.

West Virginia to the sheriff of Jefferson County, greeting:

Whereas affidavit has this day been made before me, a justice of the peace for the township of Chapline, Jefferson County, and State
190 of West Va., by William A. Chapline, agent for Peter C. Brooks, jr., that there was due by Robert A. Lucas & Catherine S. Lucas, his wife, to the said Peter C. Brooks, jun'r, on the 1st day of January, 1871, the sum of ($600,) six hundred doll's, for rent of a tract of land in the township of Chapline & said county, due by contract.

This is to command you, in the name & by the authority of the State of West Virginia, to levy upon any of the goods & chattels of the said Robert A. Lucas and Catherine S. Lucas which may be found upon said demised premises, and make sale of the same, or so much thereof as may be sufficient to pay and discharge the said rent of ($600,) six hundred dollars, with interest from the 1st day of January, 1871, til' paid, and the costs of this proceeding.

As witness my hand and seal this 10th day of November, 1871.

JAMES WILEY, *Justice.*

(Endorsed:) Levied the within distress-warrant upon six head of horses, fifteen cattle, and twenty sheep, this 20th day of February, 1871, and delivery-bond taken.

I. THOMAS CHAPLINE,
Deputy Sheriff.

Undertaking for delivery of property.

PETER C. BROOKS, JR., PLAINTIFF,
191 *vs.*
ROBERT A. LUCAS AND CATHERINE S. LUCAS, defendants.

Whereas I. Tho's Chapline, deputy for George W. Chase, sheriff of the county of Jefferson, by virtue of a distress warrant against the property of the said Robert A. Lucas and Catherine S. Lucas, has levied upon the following property, to wit, six head of good work-horses, fifteen head of cattle, and twenty head of sheep, at the estimated value of nine hundred and fifty dollars:

Now therefore we, and each of us, undertake that the said Robert A. Lucas and Catherine S. Lucas will deliver the said property to the said sheriff at the court-house, on the 11th day of April, 1871, then and there to be sold to satisfy said distress-warrant; and in case they fail to do so, that we or either of us will pay to the said Peter C. Brooks, j'r, the sum of nine hundred and fifty dollars.

Given under our hands this 20th day of February, 1871.

R. A. LUCAS.
CATHERINE S. LUCAS.
JOHN COOK.

(Endorsed:) Received & filed this 20th day of March, 1871.
W. A. CHAPLINE,
Clerk C. C't.

192 I, James D. Fayman, deputy for W'm A. Chapline, clerk of the cir. court for s'd county & State, do certify the above and foregoing to be a true copy of the file & record as aforesaid.
Teste: JAMES D. FAYMAN,
Deputy for W'm A. Chapline, Clk C. C.

MAY 11TH, 1871.

Which was objected to by the plaintiff and his objections sustained by the court, and the said tra'script excluded from the jury; to which ruling of the court the defendant excepted.

And thereupon the defendant called William A. Chapline, a witness previously summoned, sworn, and examined by the plaintiff, who, in answer to interrogatories by the defendant, gave evidence tending to prove that a distress-warrant had been issued upon his affidavit as agent for the plaintiff for the collection of the rents accruing from the farm in controversy, from the 1st day of April, 1870, to the 1st day of April, 1871; that property of the defendant had been distrained by virtue of said distress-warrant, which had been replevied by the defendant and a forthcoming bond given to the officer levying the said distress-warrant for the delivery of the same; and that pro-
193 ceedings under said distress-warrant are still pending; and upon cross-examination the witness gave evidence tending to prove that he was not authorized to issue said distress-warrant.

And thereupon the defendant offered in evidence copies of two deeds of trust, executed by Edward Lucas & wife, one to Richard H. Lee, and one to Henry Berry, to secure certain debts due from the said Edward Lucas to Peter Saurwien and Robert Douglass, which are hereto annexed, marked "T & U," and made part hereof, in the words and figures following:

Deed of trust.—(Marked "T.")

Edward Lucas & wife to R. H. Lee.

This indenture, made this *this* eighteenth day of February, in the year one thousand eight hundred and forty-seven, between Edward Lucas and Francis, his wife, of Jefferson County, Virginia, of the one part, and Richard H. Lee, of the same county and State, of the other part: Whereas the said Edward Lucas has this day executed to Peter Saurwien three obligations, each for the sum of two hundred and sixty-two dollars and twenty-two cents, with interest thereon from the eleventh day of February, in which bonds his sons are securities, and which bonds are payable in one, two, and three years, the payment of
194 which he desires to secure, and to indemnify his securities aforesaid: Now this indenture witnesseth that the said Edward Lucas and Francis, his wife, as well for the purpose before expressed as in consideration of one dollar to them paid by the said Richard H. Lee, of which the receipt is hereby *hereby* acknowledged, do by these presents grant, bargain, and sell, alien and confirm, to the said Richard H. Lee, his heirs and assigns, all that tract of land upon which the said Edward Lucas formerly resided, upon which his sons Robert and John now live, adjoining the lands of Robert and William Lucas, Walter B.

Selby, John H. McEndree, and Adam Link, containing about two hundred and thirty acres, and bounded as follows: Beginning at a hickory, a corner of the original tract owned by his late father, Edward Lucas, dec'd; thence leaving the hickory & running with said original tract N. 80° 56′ W., 139 $\frac{2}{10}$ poles, to a stone; thence leaving said stone and running S. 8¼ W., 163 $\frac{2}{10}$ poles, to a stone near the head of a spring; thence S. 80° 56′ E., 20 poles, to a large white-oak; thence S. 8¼ W., 33 poles, to a stone marked E. L.; thence S. 81¼ E., 37 poles, to three walnut saplings standing close together on a ridge of rocks; thence S. 8¼ W.,
195 100 $\frac{5}{10}$ poles, to a locust stake in the original line; thence running with the original line N. 7½ E., 315 $\frac{6}{10}$ poles, to the beginning: To hold the said tract or parcel of land before described to the said Richard Henry Lee, his heirs and assigns, to their only and proper use forever; in trust, however, for the following purposes and none other: that is to say, to permit the said Edward, his heirs and assigns, to retain possession and to receive the rents and profits without account until a sale become necessary under the terms of this deed, and if the said Edward Lucas shall fail to pay the said bonds, or any part thereof, when due, then upon the request of the said Saurwien, his executors, administrators, or assigns, or his securities, they having paid the same, or either of said bonds, or any part thereof, then that the said Richard H. Lee, having first advertised the time, place, and terms of sale for one month in some convenient newspaper, proceed to sell the premises before described at public auction, for cash, or on such credit as the parties concerned may direct; and after defraying all reasonable expenses and charges attending the sale, shall, out of the money thence to arise, pay the debt aforesaid, and if any balance remain, shall pay over the same to the said Edward Lucas, his heirs or assigns, and shall
196 convey the premises sold to the purchaser or purchasers: Provided always, that if the said Edward Lucas, his heirs or assigns, shall, at any time before sale actually made, pay the debt aforesaid and shall also pay all costs and charges which shall have accrued under this instrument, then this indenture shall have become void, and all the estate hereby granted shall cease and determine. And the said Edward Lucas, for himself and his heirs, executors, and administrators, does hereby covenant with the said Richard H. Lee, his heirs and assigns, that the said Edward Lucas is now, at the time of the delivery hereof, seized in possession of a perfect and absolute estate in fee-simple in the premises conveyed without any manner of incumbrance, and that he and his heirs, will at any time hereafter, at the request and cost of the said Richard H. Lee, his heirs and assigns, execute and deliver any further reasonable conveyance which may be necessary more fully to transfer the title to the premises before described to the said Richard H. Lee, his heirs and assigns, according to the true intent and meaning hereof. And lastly that the said Edward Lucas and his heirs, the said premises before described, will warrant and forever defend to the said Richard H. Lee, his heirs and assigns, against the claims and
197 demands of all persons whatever; and the said Richard H. Lee, for himself and his heirs, hereby covenant with the said Peter Saurwien and Edward Lucas, that he, the said Richard H. Lee, and his heirs, will faithfully execute and carry into full effect, the several trust hereby created. In witness whereof the parties to this indenture have hereunto set their hands and seals, the day and year first before written.

EDWARD LUCAS. [SEAL.]
FRANCIS LUCAS. [SEAL.]

VIRGINIA, *Jefferson County, set:*

We, Joseph McMurran & Charles Harper, two justices of the peace in and for the county of Jefferson, in the State of Virginia, do hereby certify that Edward Lucas, party to the within deed, bearing date the 18th day of February, 1847, personally appeared before us in our county aforesaid, acknowledged the same to be his act and deed, and desired us to certify his said acknowledgement to the clerk of the county court for Jefferson County, Virginia, in order that the same may be recorded. Given under our hands and seals this 15th day of February, 1847.

JOSEPH McMURRAN. [SEAL.]
CHARLES HARPER. [SEAL.]

VIRGINIA, *Jefferson County, set:*

198 We, Joseph McMurran and Charles Harper, two justices of the peace for the county aforesaid, in the State of Virginia, do hereby certify that Francis, the wife of Edward Lucas, party to the within deed, bearing date the 18th day of February, 1847, personally appeared before us, in our county aforesaid, and having the deed aforesaid fully explained to her, and being by us examined privily and apart from her said husband, she acknowledged that she had willingly and of her own accord, signed, sealed, and delivered the same, and wished not to retract it, and desired us to certify the said acknowledgement to the clerk of Jefferson County, Virginia, that the same may be recorded. Given under our hands and seals this 15th day of February, 1847.

JOSEPH McMURRAN. [SEAL.]
CHARLES HARPER. [SEAL.]

JEFFERSON COUNTY, *set:*

At a court held for said county on the 19th day of July, 1847, the foregoing deed was produced to the court, certified for record as above, & ordered to be recorded.

Teste: T. A. MOORE, *Clerk.*

A copy. Test: GEO. W. CHASE, *R. J. C.*

Deed of trust.—(Marked "U.")

E. Lucas & wife to Henry Berry.

199 This indenture, made this 6th day of April, 1843, between Edward Lucas & Francis, his wife, of the county of Jefferson, and State of Virginia, of the first part; Henry Berry, of the county of Jefferson, and State of Virginia, of the second part; and Robert Douglass, of the county of Jefferson, and State of Vieginia, of the third part: Whereas the said Edward Lucas is indebted to the said Robert Douglass, in the sum of five thousand and five dollars, by two single bills, bearing the same date with this deed, one for two thousand five hundred and two dollars, payable in six months, and the other for two thousand five hundred and three dollars, in twelve months, with interest from date, and being desirous to secure said debt, has agreed to give this deed of trust: Now this indenture witnesseth that the said Edward Lucas & Francis, for and in consideration of the premises, and also for and consideration of the sum of one dollar, current money of the United States, in hand paid by the said Henry Berry to the said

Edward Lucas, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged by the said Edward Lucas & Francis, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Henry Berry, all the right,
200 title, interest, and claim of them, the said Edward Lucas & Francis Lucas, in and to a tract of about one hundred and fifty acres of land lying and being about three miles from Shepherdstown, in the county aforesaid, bounded by the lands of Adam Link, Samuel Melvin, Robert Lucas, Daniel Hendricks, David Hess, the heirs of Philip Romenour, and William Dulia, and other lands of the said Edward Lucas: To have and to hold the said tract of land to the said Henry Berry, his heirs, executors, administrators, or assigns forever—

In trust for the following use, intent, and purpose, and no other, that is to say, if the said Edward Lucas shall fail to pay to the said Robert Douglass, his heirs, executors, administrators, or assigns, the aforesaid sum of five thousand & five dollars, in one year, then, and in that case, at the request of the said Robert Douglass, the said Henry Berry shall and may sell at public vendue the land aforesaid to the highest bidder for ready money, having previously advertised the time and place of sale, at least two weeks in some newspaper printed in Jefferson County, and the money arising from said sale shall first apply to the dis-
201 charge of all reasonable expense attending the execution of this trust, including the usual commission to said trustee, and then to the discharge of the aforesaid debt, and all interest due thereon; and the residue, if any there be, shall pay over to the said Edward Lucas, his executors, administrators, or assigns; and the said Edward Lucas, for himself, his heirs, executors, or administrators, does hereby warrant and defend forever to the said Henry Berry, the said tract of land against the claims and demands of all persons whatsoever.

In witness whereof the said Edward and Francis have hereunto set their hands and seals the day and year first aforesaid.

EDWARD LUCAS. [L. S.]
FRANCIS LUCAS. [L. S.]

Signed, sealed, and delivered in presence of—

JEFFERSON COUNTY, *to wit:*

We, George Reynolds and Charles Harper, justices of the peace for the county aforesaid, in the State of Virginia, do hereby certify that Edward Lucas, party to a certain deed bearing date on the 6th day of April, 1843, and hereto annexed, personally appeared before us, in our county aforesaid, and acknowledged the same to be his act and
202 deed, and desired us to certify the said acknowledgement to the clerk of the county court of Jefferson, in order that the said deed may be recorded.

Given under our hands & seals this 6th day of April, 1843.

GEORGE REYNOLDS. [SEAL.]
CHARLES HARPER. [SEAL.]

JEFFERSON COUNTY, *to wit:*

We, George Reynolds and Joseph McMurran, justices of the peace for the county aforesaid, in the State of Virginia, do hereby certify that Frances Lucas, the wife of Edward Lucas, parties to a certain deed bearing date on the 6th day of April, 1843, & hereto annexed, personally appeared before us, in our county aforesaid, and being examined by us privily and apart from her husband, & having the said deed fully

explained to her, the said Frances Lucas acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 6 day of July, 1843.

GEORGE REYNOLDS. [SEAL.]
JOSEPH McMURRAN. [SEAL.]

JEFFERSON COUNTY, *sct:*

203 CLERK'S OFFICE OF THE COUNTY COURT.

On the 27th day of July, 1843, the foregoing deed was received in said office & admitted to record.

Teste:

T. A. MOORE, *Clerk.*

A copy. Teste:

GEO. W. CHASE, *R. J. C.*

And the defendant also offered in evidence the original bonds secured by said deeds of trust, which are hereto annexed, marked "V" & "X," and made part hereof; which bonds, with the indorsements thereon, are in the words and figures following:

Bond.—(Marked "V.")—E. Lucas to Peter Saurwein.

We and each of us bind ourselves & our heirs to pay to Peter Saurwein, or order, one year after date, the just & and full sum of two hundred & sixty-two dollars & twenty-two cents, with legal interest thereon from the 11th day of February, 1847.

Witness our hands & seals this 18th day of February, 1847.

$262.22.

EDWARD LUCAS. [SEAL.]
JOHN LUCAS. [SEAL.]
R. A. LUCAS. [SEAL.]
BENJ. LUCAS. [SEAL.]

(Endorsement:) I assign the within bond, and the benefit of the deed of trust to secure the same, to Robert A. Lucas, but without recourse to me, for value received.

PETER SAURWEIN.

204 For value rec'd, I hereby assign the within to J. H. Shepherd, trustee, for sole and seperate use of Catherine S. Lucas, with benefit of the deed of trust securing the same.

Jan'y 8th, 1849.

R. A. LUCAS.

Bonds.—(Marked "X.")—E. Lucas to P. Saurwein.

We and each of us bind ourselves & our heirs to pay Peter Saurwein, or order, two years after date, the just & full sum of two hundred & sixty-two dollars & twenty-two cents, with legal interest from the 11th day of February, 1847.

Witness our hands & seals this 18th day of February, 1847.

$262.22.

EDWARD LUCAS. [SEAL.]
JOHN LUCAS. [SEAL.]
R. A. LUCAS. [SEAL.]
BENJ. LUCAS. [SEAL.]

(Endorsed:) I assign the within bond, and the benefit of the deed of trust to secure the same, to Robert A. Lucas, but without recourse to me, for value received.

PETER SAURWEIN.

We & each of us bind ourselves & our heirs to pay, three years after date, to Peter Saurwein, or order, the sum of two hundred & sixty-two dollars & twenty-two cents, with interest thereon from the 11th day of February, 1847.

205 Witness our hands & seals this 18th day of February, 1847. $262.22.

EDWARD LUCAS. [SEAL.]
JOHN LUCAS. [SEAL.]
R. A. LUCAS. [SEAL.]
BENJ. LUCAS. [SEAL.]

(Endorsed:) I assign the within bond and the benefit of the deed of trust to secure to Robert A. Lucas, but without recourse to me, for value received.

PETER SAURWEIN.

(2nd endorsement on both.)

For value rec'd, I hereby assign the with' bonds to J. H. Shepherd, trustee, for the sole and seperate use of Catharine S. Lucas, with the benefit of the deed of trust securing the same. Jan'y 8th, 1849.

R. A. LUCAS.

Bond.—(Marked "V.")—E. Lucas to Robert Douglass.

Six months after date we bind ourselves and our heirs, jointly and severally, to pay to Robert Douglass, the sum of two thousand five hundred and two dollars, with interest thereon from date. For value received. As witness our hands and seals this 6th day of April, 1843.

EDWARD LUCAS. [SEAL.]
JOSEPH McMURRAN. [SEAL.]
WILLIAM McMURRAN. [SEAL.]

(Endorsements.)

MAY 1844.—Rec'd interest on the within to 6th Ap'l, '44.

ROB'T DOUGLASS.

206 FEB'Y 27, 1846.—Rec'd interest on the within to the 6th April, 1845.

ROB'T DOUGLASS.

Rec'd interest on the within for 18 mo's from within date to Sept. 6, '46.

ROB'T DOUGLASS.

Rec'd int. on the within bond to 6th Sept., 1847.

ROB'T DOUGLASS.

Rec'd surplus int., $2.42.
$1,712.
Rec'd Shepherdstown, July 30, 1844, on the within bond seventeen hundred & 12 dollars.

ROB'T DOUGLASS.

Bal. due on this bond, Jan'y 6, 1849, $2,761.81.
I assign the within, (but without recourse to me,) to Robert A. Lucas, with the benefit of the deed of trust, securing the same, for value rec'd.
Jan'y 8th, 1849.

ROB'T DOUGLASS.

For value rec'd, I hereby assign the within to J. H. Shepherd, trustee, for the sole and seperate use of C. S. Lucas, with the benefit of the deed of trust securing the same.
Jan'y 8th, 1849.

R. A. LUCAS.

Bond.—(*Marked* "X.")—*E. Lucas to Rob't Douglass.*

Twelve months after date we bind ourselves and our heirs, jointly and severally, to pay to Robert Douglass, the sum of two thousand five hundred and three dollars, with interest from date, for value re-
207 ceived. As witness our hands and seals this 6th day of April, 1843.

EDWARD LUCAS. [SEAL.]
JOSEPH McMURRAN. [SEAL.]
WILLIAM McMURRAN. [SEAL.]

(Endorsed :)
MAY 1844.—Rec'd interest on the within to the 6th April.
R. DOUGLASS.

FEB'Y 27, 1846.—Rec'd interest on the within to the 6th Ap'l, 1845.
R. DOUGLASS.

Rec'd interest on the within for one year, up to the 6th Ap'l, 1846.
ROB'T DOUGLASS.

Rec'd interest on the within bond to the 6th Ap'l, '47.
ROB'T DOUGLASS.

Balance due on this bond Jan'y 6th, 1849, $853.20; which I assign, for value received, to Robert A. Lucas, with the benefit of the deed of trust securing the same, but without recourse to me.

ROB'T DOUGLASS.

JAN'Y 9th, 1849.

For value rec'd, I hereby assign the within to J. H. Shepherd, trustee, for the sole & seperate use of Catherine S. Lucas, with the benefit of the deed of trust securing the same. Jan'y 8th, 1849.

R. A. LUCAS.

And gave evidence, tending to prove that said bonds had been assigned to James H. Shepherd, as trustee for Catherine S Lucas, and that they are still unpaid. At the same time the plaintiff offered
208 evidence, tending to prove that the signature of R. A. Lucas and the writing above it were of recent execution.
The defendant, upon the evidence of Chapline, as heretofore stated, moved the court to instruct the jury as follows, to wit:
"If the jury finds from the evidence, that W'm A. Chapline, esq., was the agent of the executors of R. D. Shepherd, and of the plaintiff,

for the care, superintendence, and management of the farm in controversy, and the receipt and collection of the rents; and that he has caused distress-warrants to issue for the collection of the rents for the years ending on the first of April, 1869, and April 1st, 1870, which are still pending and undisposed of in the circuit court of Jefferson County, West Virginia; and that since the first day of January, 1871, the said William A. Chapline, as such agent of the plaintiff, has, in the name and on behalf of the plaintiff, caused a distress-warrant to issue for rents claimed to have accrued from April 1st, 1870, to April 1st, 1871, which has been levied on property of the defendant, and that the defendant has been required and compelled to give a forthcoming bond for the delivery of the property so levied on when the same may be
209 required, to satisfy any judgement that may be rendered in the proceedings on said distress-warrant, and that said proceedings are still pending in the circuit court of Jefferson County, of West Virginia, then such proceedings constitute a waiver of the notice to quit offered in evidence by the plaintiff, and the jury shall find for the defendant.

Which instruction the court refused to give; and the defendant then and there excepted to said refusal.

And the plaintiff having offered evidence tending to prove that the said William A. Chapline was not authorized to issue a distress-warrant for the collection of the rents accruing from April 1st, 1870, to April 1st, 1871, and that Cha's J. Faulkner, esq., attorney for the plaintiff, had expressed his disapprobation of the act of said agent in issuing said last mentioned distress-warrant, the defendant moved the court to instruct the jury as follows, to wit:

"No expression of disapprobation on the part of the plaintiff or his attorney of the act of the agent of the plaintiff in issuing the distress-warrant mentioned in the last instruction can defeat the operation of said warrant in waiving the notice to quit, so long as proceedings
210 on said distress-warrant are pending, and the plaintiff holds the forthcoming bond for the property levied on."

Which instruction the court refused; and to which refusal the defendant then and there excepted.

And the defendant having offered evidence to prove that Edward Lucas, in his life-time, had executed two deeds of trust to secure the payment of certain debts therein described, the defendant moved the court to instruct the jury as follows, to wit:

"If the jury believe from the evidence that there is an outstanding deed of trust, dated on the 18th day of February, 1847, conveying the legal title to the farm in question to R. H. Lee, in trust to Peter Sauerwein, and that neither he nor sestui que trust nor any one entitled to receive payment of said debt so secured were made parties to the suit of Towner's administrator vs. Edward Lucas, executor, & others, and that said outstanding lien was of older date than the lien of Towner's judgment, to enforce which said suit was brought, and that said first-mentioned lien is still subsisting and unpaid, they will find for the defendant."

211 Which instruction the court refused to give; and to which refusal the defendant then and there excepted.

And the defendant further offered evidence to prove that the said Edward Lucas, in his life-time, to wit, on the 6th day of April, 1843, executed a deed of trust on the premises in controversy, conveying to Henry Berry the legal title thereto, to secure a debt due from the said Edward Lucas to Robert Douglass, and that the said debt still remains

unpaid and has been assigned to James H. Shepherd, as trustee for Catharine S. Lucas, whereupon the defendant requested the court to charge the jury as follows, to wit:

"If the jury find from the evidence that the debts secured by the deeds of trust from the said Edward Lucas to R. H. Lee & Henry Berry, were assigned to James H. Shepherd, as trustee for Catharine S. Lucas, and that the said Rezin D. Shepherd was not the owner of said debts, at the time of the sale under the decree of the circuit court of Jefferson County, that proceeding cannot defeat the title of the trustees to the deeds of trust to secure their payment, although they may have been audited and credited to him in that proceeding, unless the said James H. Shepherd and Catherine S. Lucas were parties to that
212 proceeding."

Which instruction the court refused to give; and to which refusal the defendant then and there excepted.

And thereupon the court, on its own motion, in lieu of instructions, offered by both parties, instructs the jury as follows, to wit:

The court instructs the jury that the will of R. D. Shepherd grants the land in controversy to the three devisees and legatees, Ellen Brooks, P. C. Brooks, jr., and Shepherd Brooks, and that the sealed letter accompanying said will, bearing date September 1st, 1859, in no wise alters or modifies it, and creates no new estate in any one, and it having been produced at the instance of the defendants, and by them offered in evidence, they are bound by its contents, and are not permitted to impeach the correctness of its statements.

The court further instructs the jury that the letter of P. C. Brooks jr., and Shepherd Brooks, bearing date November 29th, 1865, addressed to Mrs. Catherine Lucas, the wife of the defendant in this cause, and her reply of December 11th, 1865, and the subsequent agreement by
213 letters changing the time of the commencement of the lease from the 1st of January to the 1st of April, as well as the time of the payment of the rents from the 1st day of January to the 1st of December, constitutes a lease of the premises to her by them, which she may take, but being a married woman, by operation of law, the lease becomes the absolute property of her husband, and thereby creates the relation of landlord and tenant between him and the lessors; and the fact that no particular time is mentioned in the contract of lease, when such relation should cease between the parties, taken in connection with the fact, that the plaintiffs reserved in the contract the right to increase the rent thereafter, or to make other changes in it, upon giving one year's notice, creates a tenancy from year to year, which may be terminated upon one year's notice as prescribed by said contract of lease.

The relation of landlord and tenant, having been established, as set forth in the preceding instruction, the tenant is estopped from denying his landlord's title.

And the fact that there were outstanding liens upon said land,
214 or that the defendant was in possession of the same at the time that the testator, R. D. Shepherd, became the purchaser under the decree of the circuit court of Jefferson County, at the suit of Towner's adm'r vs. Edward Lucas' ex'or et al., does not warrant the defendant, under the circumstances of this case, in disclaiming his landlord's title.

That, before the plaintiff can recover, the jury must be satisfied that the notice required by the contract of lease was given, and, if given by the plaintiff, and there was afterwards a distress-warrant sued out to recover rent due and in arrear for the leased premises, in favor of the plaintiff by his agent Chapline, the presumption of law would be that it was sued out with the assent of the plaintiff, in which event he could

not maintain this action, unless the evidence satisfies the jury, that the agent Chapline exceeded his authority in suing out such warrant, acting without the knowledge or consent of his principal, after his principal, the plaintiff, had, by notice, according to the contract of lease, terminated the tenancy, in which event he would be entitled to recover."

To which instructions the defendant excepted. And the evi-
215 dence and arguments of counsel, being closed, and the jury having returned a verdict for the plaintiff, the defendant moved the court to set aside the verdict, and grant him a new trial for reasons filed with the said motion; which motion and the reasons therewith are in the words and figures following:

Motion for a new trial.

U. S. district court.

PETER C. BROOKS } In ejectment. Motion for a new trial.
vs.
ROBERT A. LUCAS. }

And now came the defendant and moved the court to set aside the verdict, and grant him a new trial in this cause for the following reasons, to wit:

1st. Because the verdict is contrary to law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the court erred in ruling and excluding from the jury the depositions in the defendant's bill of exceptions.

4th. Because the court erred in admitting the deed from Ellen Brooks and Shepherd Brooks to Peter C. Brooks mentioned in defendant's bill of exceptions, in evidence to the jury.

5th. Because the court erred in refusing to instruct the jury as prayed for by the defendant, as set forth in defendant's bill of exceptions.

216 6th. Because the court erred in charging the jury, as set forth in the defendant's bill of exceptions.

7th. And for other errors.

(Signed) D. B. LUCAS &
(Signed) STAUNTON & ALLISON,
Att'ys for Def't.

Which motion was overruled by the court; to which decision of the court, in overruling said motion, the defendant excepts. And the defendant now here tenders this his bill of exceptions, to the several rulings of the court in sustaining the plaintiff's objections to the defendant's evidence, and in excluding the same from the jury, and in overruling the defendant's objections to the plaintiff's evidence, and in permitting the same to go to the jury, and to each and every of the decisions of the court in refusing the instructions to the jury prayed for by the defendant, and the instructions given by the court to the jury, and to each and every of the decisions of the court, as herein set forth; and prays the court to sign and seal this his bill of exceptions, and that the same may be made a part of the record, which is accordingly done.

(Signed) J. J. JACKSON, JR. [SEAL.]

217 *Bond.*

Supreme Court of the United States.

Know all men by these presents that we, Robert A Lucas, James A. Hurst, and W'm M. Shepherd, are held and firmly bound unto Peter C. Brooks, in the sum of seven thousand dollars, to be paid to the said

Peter C. Brooks, his executors, or administrators; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 24th day of August, 1871.

(Signed)	R. A. LUCAS.	[SEAL.]
(Signed)	J. A. HURST.	[SEAL.]
(Signed)	W. M. SHEPHERD.	[SEAL.]

Whereas the above-named Robert A. Lucas hath prosecuted a writ of error to the Supreme Court of the United States to revive the judgment rendered in the suit of Peter C. Brooks vs. Robert A. Lucas, by the district court of the United States for the district of West Virginia:

Now, therefore, the condition of the obligation is such, that if the above-named R. A. Lucas shall prosecute his said writ of error
218 to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue. Sealed with our seals and dated this 24th day of August, 1871.

(Signed)	R. A. LUCAS.	[SEAL.]
(Signed)	J. A. HURST.	[SEAL.]
(Signed)	W. M. SHEPHERD.	[SEAL.]

UNITED STATES OF AMERICA,
District of West Virginia:

Before me, the undersigned authority, personally came R. A. Lucas, J. A Hurst, and W'm M. Shepherd, and severally acknowledged the signing and sealing of the foregoing and within bond for the purposes therein expressed, and that after the interlineation of the name of J. A. Hurst.

Given under my hand at my office in Berkeley County, in said district, this 24th day of August, 1871.

(Signed) H. H. BLACKBURN,
Com'r of U. S. Circuit Court, District of West Va.

(Endorsed:) Approved.
(Signed) J. J. JACKSON, J'R,
Judge D. C. U. S., W. Va.

219 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the district of West Virginia, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said court before you, between Peter C. Brooks, j'r, plaintiff, and Robert A. Lucas, defendant, a manifest error hath happened, to the great damage of the said Robert A. Lucas, as by the said complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the

same at Washington, on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and
220 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

DISTRICT COURT
UNITED STATES,
DISTRICT WEST VIRGINIA,
WHEELING, W. VA.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this day of August, in the year of our Lord one thousand eight hundred and seventy-one.

(Signed) JASPER Y. MOORE,
Clerk of the District Court of the United States for the District of West Virginia.

Citation.

UNITED STATES OF AMERICA, *ss:*

To PETER C. BROOKS, J'R, greeting:

You are hereby commanded and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of West Viiginia, at Wheeling, wherein Robert A. Lucas is
221 plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States this 25th day of August, in the year of our Lord one thousand eight hundred and seventy-one.

(Signed) J. J. JACKSON, J'R.
Judge of the District Court of the United States for the District of West Virginia.

(Endorsed:)

I acknowledge due and legal service of this citation this 28th day of August, 1871.

(Signed) CHA'S J. FAULKNER,
Counsel for P. C. Brooks, J'r.

222 In the district court of the United States for the district of West Virginia.

PETER C. BROOKS
vs.
ROBERT A. LUCAS.

Whereas there was a suit of ejectment instituted in the above cour- against Robert A. Lucas and Catharine S. Lucas, in which, at the Not vember term, 1870, of said court, the plaintiff suffered a non-suit, and subsequently instituted the suit named in the caption hereof to recover the said property, and whereas by the written consent of counsel it was agreed that the depositions taken by the defendants in the said suit against Robert A. Lucas and Catherine S. Lucas, in order to avoid the

delay and expense of retaking them, might be used on the trial of the suit of Peter C. Brooks vs. Robert A Lucas, subject to such exceptions, and such only, as if regularly taken on due notice in the last-named cause; and whereas said written agreement seems by some accident not to have been copied into the record to which this writing is appended: Now, therefore, this is to certify that there was such an agreement as that above mentioned, which was brought to the attention of, and recognized by, the said court, without exception, and it is hereby consented that the depositions taken in the case of Peter C. Brooks vs.
223 Robert A. Lucas and Catherine S. Lucas shall be liable to such exception, and such only, as if regularly taken upon due notice in the case of Peter C. Brooks vs. Robert A. Lucas.

(Signed) CHA'S J. FAULKNER,
Att'y for Pl'ff.

(Signed) DAN'L B. LUCAS.

(Signed) GREEN & LUCAS,
For Defendant.

224 UNITED STATES OF AMERICA,
District of West Virginia, sc't:

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing is a true copy of the record and proceedings of the case of Peter C. Brooks, j'r, against Robert A. Lucas, lately depending in the district court of the United States for the district of West Virginia, at Wheeling, and now remaining on file in my office.

In testimony whereof I hereto set my hand and the seal of said district court, at Clarksburg, in said district, this 17th day of October, A. D. 1871, and in the 96th year of the Independence of the United States of America.

[SEAL.] JASPER Y. MOORE,
Clerk D. C. U. S., for D. W. Va.

(Indorsement on cover:) No. 535. Robert A. Lucas, plaintiff in error, vs. Peter C. Brooks, j'r. West Virginia D. C. U. S. Filed 14th December, 1871.

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Corrected brief

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1873. No. 84.

ROBERT A. LUCAS, Plaintiff in Error.

vs.

PETER C. BROOKS, Jr.

In Error to the District Court of the United States for the District of West Virginia.

BRIEF OF C. W. B. ALLISON & DANIEL B. LUCAS,

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No. 84. OCTOBER TERM, 1873.

ROBERT A. LUCAS, Plaintiff,
vs.
PETER C. BROOKS, JR.
} Error to the District Court of the United States, for the District of West Virginia.

Abstract of Case, Questions Involved, and Manner in which they are Raised.

The action below was in ejectment brought by Peter C. Brooks, jr. Dec. 14, 1870, against the plaintiff in error Robert A. Lucas, to recover the possession of 293 acres of land, of the value of $25,000 of which the declaration alleges the plaintiff below was "lawfully seized and possessed in fee simple" on the 1st day of Jan., 1869, being "the same tract of land conveyed by E. I. Lee as special Comr. to R. D. Shepherd by deed recorded, deed book No. 39 &c., which was leased by said R. D. Shepherd to the defendant Robt. Lucas on the 30th of January, 1859, and which under the will of the said R. D. Shepherd, and partition made of his estate, now belongs to the plaintiff, and which was leased to the defendant, and upon which the defendant now lives." The declaration further alleges, that the plaintiff being so seized and possessed, the defendant on the 1st of April, 1870 entered thereon and now withholds the same to plaintiff's damage and therefore he sues. [See page 1.]

At February Rules 1871, the defendant demurred generally to the declaration, and plead the general issue to which the plaintiff joined. [See page 3.]

In May 1871, a jury was empannelled and the case was tried, and a verdict rendered in favor of the plaintiff "for the land and premises in the declaration mentioned. During the progress of the trial the defendant took various exceptions to rulings of the Court, and after the rendition of the verdict moved for a new trial for reasons shown

in the record, which action was overruled by the Court, to which the defendant excepted, and judgment was rendered that the plaintiff recover the possession of the premises with costs of suit. [See page 4 and 78.] A bill of exceptions was taken by the defendant, which was signed and sealed by the Court, which combined his various exceptions taken in the case. [See page 4 to 78.]

The following facts are shown by the bill of exceptions.

Both parties claimed the right of possession derived from Rezin D. Shepherd, deceased, who was the grand father of the plaintiff, and the uncle of Mrs. Catharine A. Lucas, the wife of the defendant, and daughter of Abraham Shepherd, deceased, a brother of R. D. Shepherd—the defendant, however, claiming that the possession and right of possession were in his wife Catharine, as her separate estate, and that he was there only in her right, but if neither his wife nor himself had a perfect right of possession, the plaintiff had not seizin or right of possession and could not recover in this action.

The plaintiff to prove the issue upon his part gave in evidence.

1. The record of a suit in Chancery in the Circuit Court of Jefferson County, West Va., where the land is situated commenced in March 1858, wherein Benj. T. Towners, Administrator, was complainant, and Edward A. Lucas' Executor and heirs were defendants, the defendant Robert A. Lucas being one of them. (See pages 5 to 17.) This record shows that the farm in controversy was formerly, to-wit: in 1844 the property of Edward Lucas, Sr., (the father of Robert A. Lucas,) who died in 1849. In May 1844, Towner recovered a judgment against Edward Lucas, Sr., for over $2000, and two additional judgments for similar amounts, in 1845 and 1846, which became liens upon said farm. On the 19th of September 1848, the said Edward Lucas sold and conveyed said farm by general warranty deed for an expressed consideration of $15,000, to his son Robert A. Lucas, defendant. The bill sought a sale of the farm to satisfy the said judgments. Robert A. Lucas answered admitting the liens, and his purchase of the farm from his father, which was subject to other liens by judgments and deeds of trust older than these of Towner, and claiming that to enable him to make the purchase he had borrowed $9000 from R. D. Shepherd, and paid the same upon such prior liens and took assignments of the claims which were then held by said R. D. Shepherd as further security for said loan, and should be paid before the liens of complainant; that said Shepherd was not then in the State, but should be made a party to the suit. Without making

R. D. Shepherd a party, the Court at its October Term 1858, ordered an account by a Commissioner, who made report April 19th, 1859, that the various debts of Edward Lucas' estate, which were liens upon the farm, amounted to $26,313,91, all of which were then held by R. D. Shepherd as assignee, including the three Towner judgments which he had purchased since the suit was brought, and that the farm was worth $70.00 per acre. The Commissioner made a further report that there was then due from Robert A. Lucas to R. D. Shepherd, upon two bonds for $9000, secured to said Shepherd by a deed of trust from said Robt. A. Lucas upon said farm, subject to the other liens the sum of $14,516.06 from which should be deducted $13,769.75 for four of the debts and liens aforesaid, which had been assigned by R. A. Lucas to R. D. Shepherd, which left a balance of $746,31 remaining due from the former to the latter

The commissioners report was confirmed May, 1859, and the Court decreed that Edmund I. Lee, the trustee in the deed of trust from R. A. Lucas, for the benefit of R. D. Shepherd, should sell the farm at public auction.

Under the last decree, E. I. Lee, special commissioner, made report that he had sold the farm of Robert A. Lucas to R. D. Shepherd, for $80 per acre, amounting to $23,459. This sale was confirmed at the October term, 1859. After a further account a final decree was rendered at the November term, 1859, by which the executor of Edward Lucas' estate was ordered to pay R. D. Shepherd $2,440.73, balance due him upon said claims assigned to him, and that Robt. A. Lucas pay to said Shepherd $2,101.72.

2. The plaintiff next gave in evidence in this case a deed from E. I. Lee, special commissioner, to R. D. Shepherd, dated October 24, 1859, for the farm. (See page 17.)

3. The will of R. D. Shepherd, dated September 1, 1859, and probated in Jefferson county, West Va., March 12, 1866. (See p. 18.)

ITEM 1. "Having given property and money at different times to "my family connections, the greater part of which stands charged on "my books under the head of an account there opened and called "'Family accounts,' I will and bequeath to each therein named, what-"ever may have been so given and charged, or anything that I may "hereafter give during my lifetime."

2. "I will and bequeath to my daughter Ellen Brooks, and her "two sons, Peter C. Brooks and Shepherd Brooks, all my property, "real, personal and mixed, and wherever it may be found, giving one-

"third to each; and I direct that they be put into possession of it "without delay."

3. "I constitute and appoint my two grandsons, Peter C. Brooks "and Shepherd Brooks, executors of this, my will, giving them seizin "of my entire estate; and I direct that they be fully authorized to act "as such without being obliged to give security of any kind; and in "case of death or absence, or inability to act of either of them, I hereby "empower the other to act alone, in carrying out the provisions of "this, my last will and testament." (See p. 14.)

By the foregoing will, it was claimed by the plaintiff below, that the legal title and right of possession to the farm, vested at the death of the testator in Ellen Brooks and her two children in equal proportions, by virtue of the 2d item of the will, whilst upon the part of the defendant it was claimed that if the legal title was in the testator at his death, it then became vested in his *executors*, by virtue of the 3d item.

Peter C. Brooks and Shepherd Brooks were qualified as executors, giving bond for $2,920,000, being double the sworn value of the estate. (See p. 19)

3d. A deed from Ellen Brooks and Shepherd Brooks to Peter C. Brooks, for the premises in controversy. This deed is dated May 19, 1866, expresses a consideration of $12,000, and describes the parties as "equal and only devisees of R. D. Shepherd, deceased." (See p. 19 to 21.)

To the admission of this deed in evidence the defendant objected, but his objection was overruled by the Court. (See p. 21.)

4th. The plaintiff next gave in evidence a lease from R. D. Shepherd to the defendant, R. A. Lucas, dated August 30th, 1859, reciting the sale by E. I. Lee, trustee and commissioner to R. D. Shepherd, on the 6th day of August, 1859, of the 293 acres belonging to said Lucas, and upon which he then resided, and providing that said Lucas was to continue on said land as tenant of R. D. Shepherd, until the 1st day of April, 1861, he paying as rent $833.33, on the 30th of June, 1860, and a like sum on the 30th of March, 1861. (See p. 21 & 22.)

5th. The plaintiff then gave evidence tending to prove that the defendant occupied the farm from August 30, 1859, until the commencement of this suit, and ever since, and that defendant's wife had paid the rent falling due *January*, 1867 and 1868, and that defendant had refused to pay rent since. (See p. 22.)

6th. The plaintiff then gave in evidence a notice of the plaintiff to

× One half the cost + value: see R. p. 60.

the defendant and *his wife,* dated and served February 15, 1869, in the following words:

"To Robert A. Lucas and Cathrine S. Lucas, his wife:

"In accordance with the terms and provisions of the lease under which you now hold and occupy a tract of land in the county of Jefferson, State of West Virginia, belonging to me, which lease provides that yuo shall receive one year's notice in advance, 'if the rent should be increased, or any other change' made in the property: This is to give you notice that I hereby terminate, on the first day of April, 1870, the lease under which you now hold and occupy said land; and I require you to surrender to me quiet and peaceable possession of said tract of land on the said first day of April, 1870.

"PETER C. BROOKS, JR."

FEB. 15, 1869.

Without offering in evidence the lease evidently referred to in the above notice, or any lease such as therein described, the plaintiff here rested his case. (See p. 22 and 23.)

It will be seen that the only lease offered in evidence by the plaintiff was the one from R. D. Shepherd to the defendant, Robt. A. Lucas, which by its terms ended on the 1st day of April, 1861. It will be also be seen that the suit was not commenced until eight months and fourteen days after the expiration of the time limited in the notice.

The defendant, to prove the issue upon his part, and particularly to show that he did not hold under said lease of August 30, 1859, and that the possession and right of possession were in his wife as her separate estate from and after the expiration of his said lease, on the 1st of April, 1861, and to show that he was not estopped from denying the plaintiff's title and right of possession; and as explanatory of the record in the case of Towner's administrator against Charles W. Lucas, executor and others, which had been given in evidence by the plaintiff, gave in evidence, without objection, a letter from his wife to R. D. Shepherd, dated Feb. 12, 1861, enclosing a memorandum for a lease of the farm to *her.* The memorandum is as follows:

"ELMWOOD, February 12th, 1861.

"This is to certify, that I have rented and taken from R. D. Shepherd, Sr., his farm known as Elmwood, in the county of Jefferson, State of West Virginia, for the term of one year, to commence the 1st day of April next, 1861, at the yearly rent of nine hundred dollars.

CATHARINE LUCAS."

Also, a letter of R. D. Shepherd of February 17, 1861, to Catharine Lucas, accepting said lease. (See page 25, and 35, 36.)

The defendant also gave in evidence, without objection, a letter of P. C. & S. Brooks, executors of R. D. Shepherd, to Catharine A. Lucas, of November 29, 1865, (see page 23,) and her reply of December 11, 1865, (see p. 24,) which are as follows:

"BOSTON, MASS., Nov. 29, 1865.

"DEAR MADAM: As executors of the estate of Mr. R. D. Shepherd, we address you regarding the disposition of the farm belonging to him, on which you live. We have two propositions to make to you, either of which you can accept. First, To occupy the place and pay therefor to us, or our agent, the yearly rent of $600, on the 1st of December of each year; the lease to begin January 1, 1866. If the rent should be increased, or any other change made, you are to receive one year's notice of it in advance; you are to make all repairs and to pay all expenses on the property excepting taxes, not allowing it to deteriorate. Second, The place to be sold as soon as convenient; to be paid for one-half in cash, to come to us; the other half to remain on mortgage, which will be put in trust for your benefit during your life, and go to your children outright at your death. Meanwhile, until the sale, and as long as you occupy the place, we expect you to pay rent at the rate of $600 per annum, beginning January 1, 1866. We advise the selection of the second proposition, *as being the best for all parties concerned*; because, if you choose the first, and then fail to perform your part of the contract which, judging from past experience, may be the case, we do not bind ourselves to carry out the second proposition, and the property would *probably* be sold on terms *much less advantageous to you.* Please inform us, when fully decided, which proposition you prefer to take, and repeat it in writing. You will understand that this communication, being purely on business affairs, is expressed in a business manner, and not intended to be otherwise than

Yours, &c.,

"P. C. BROOKS, JR.,

"SHEPHERD BROOKS.

"To Mrs. CATHARINE A. LUCAS, Shepherdstown, Va."

"JEFFERSON CO., VA., ELMWOOD, Dec. 11, 1865.

"Messrs. P. C. & S. BROOKS:

"*Dear Sirs:* Your letter of Nov. 29th, was received the 2d inst. I have concluded to accept of your first proposition, that is, rent this farm at $600 a year. As all property is rented here the 1st of April, I wish to make one request, which is to change the date. The rent to be paid the 1st of January, the lease to begin the 1st of April. My reason for making this request is, in case I should be required to leave the farm, I would then have time to find another home.

"Yours, &c., CATHARINE S. LUCAS."

In connection with said letters, it was agreed that the modification of the terms of the lease proposed by Mrs. Lucas, as to the time when

the lease should commence and when the rent should be paid, were accepted by said P. C. & S. Brooks, executors. (See p. 24.)

The defendant for the purpose aforesaid, also offered in evidence the depositions (including their exhibits) of Robert Lucas, Robert A. Lucas, James H. Shepherd, J. P. A. Entler, I. P. Chapline, A. R. Boteler and Moses H. Whiting, which are found on pp. 28 to 58, to which the plaintiff objected, "and the Court sustained the objection so far as they tended to prove that Catharine Lucas derived title to the property in controversy under the will of R. D. Shepherd, and so far as they refer to conversations and other verbal statements held between said witnesses and R. D. Shepherd concerning his purposes as to said farm, to which ruling the defendant excepted." (See page 58.)

Those depositions tended to prove the following facts.

James H. Shepherd (a brother of R. D. Shepherd) died unmarried in 1837, at New Orleans, leaving a large estate, real and personal. He left six brothers and sisters, to-wit: R. D. Shepherd, Abraham Shepherd, (father of Catharine Lucas,) Henry Shepherd, Moses Shepherd, Ann Hammond and Eliza Lee. R. D. Shepherd was in affluent circumstances and a large creditor of the decedent, whilst the other brothers and sisters were comparatively poor. Having great confidence in the honor and generosity of his brother R. D. Shepherd, and to secure his indebtedness to him, James H. Shepherd devised all his vast estate to his rich brother. At the same time he left therewith a sealed letter, directed to his brother R. D. Shepherd, directing that out of his estate, after the payment of his debts, his sister Ann should be paid $5000, Moses nothing, Eliza $10,000, and the residue should be divided amongst his nephews and nieces. The estate (probably by reason of good management upon the part of R. D. Shepherd,) yielded a considerable sum after paying the debts, and therefore R. D. Shepherd paid the amounts to his sisters as directed in the sealed letter, and for a time he was liberal in his gifts, or more properly aided certain of his brothers, and nephews and nieces by distribution of the surplus, by virtue of the will and sealed letter aforesaid. See deposition of Robert Lucas, p. 28, deposition of R. A. Lucas, p. 29, of Jas. H. Shepherd, p. 30 37. Deposition of J. P. A. Entler, and letters of R. D. S. to his brother, the father of Catharine L., of October 9th, 1838, pp. 37 and 38, of August 21, 1837, p. 39, of October 8, 1837, latter part and *ada ada*, pp. 41 and 42, of May 1, 1838, p. 43, of May 4, 1838, p. 44, of June 24, 1838, p. 45, August 18, 1838, p. 46-7, of November 1838, p. 48, of December 4, 1838, p. 51-2, of August 11, 1839, to

E. I. Lee, pp. 52-3, of April 24, 1844, p. 55, deposition of I. T. Chapline, p. 56, deposition of Moses Whiting, pp. 57-8.

These depositions tend to prove, also that R. D. Shepherd bought the land in controversy for the defendant's wife, and as her seperate property. It was first purchased in 1848, from the father of the defendant, in the name of the defendant, but in equity he was but trustee for his wife, (see testimony of defendant p. 29 and 30.) It was repurchased at the Commissioners sale in 1859, in the name of R. D. Shepherd, but for the benefit of defendant's wife. Robert Lucas says that R. D. S. told him that he had James H. Shepherd to attend the sale and "buy it in for Catharine," and the witness was induced not to bid at the sale from previous conversations with him. (See p. 29.) He had the three Towner judgments under which the land was sold, assigned before the sale to James H. Shepherd, in trust for his sister Catharine, the defendants wife. See exhibits 2 and 4, pp. 32-3-4, and testimony of J. H. S., p. 34, see also, his assignment of the decree in his favor in the Towner case, as follows, (p. 31.)

"For and in consideration of the love and affection which I bear to my niece, Catharine A. Lucas, I assign the within decree to James H. Shepherd, trustee, for the sole and separate use of the said Catharine A. Lucas, as if she were sole and unmarried, and direct that he take the necessary legal steps to have the same paid, or satisfactorily secured for the purposes of the trust hereby intended.

"Witness, my hand and seal, Nov. 26, 1869.

"R. D. SHEPHERD, [SEAL.]

J. H. Shepherd testified, that a week before the sale R. D. S. directed him to attend the sale and bid, and if he could buy it at $75 per acre, he would give him a deed in his name for the benefit of his sister Catharine, and her children. (See p. 37.)

I. Thomas Chapline, testified that R. D S., a short time before his death, in conversation about the Lucas farm, spoke of the defendant in rather an unkind manner, and said he had bought that farm and given it to Mrs. Lucas, his niece. (See p. 56.)

Moses Whiting testified, that about the beginning of the war, (1861) in talking about the Lucas farm, said "he intended it for Mrs. Catharine Lucas. He wanted her to live there her life time. He wanted it for her and her children for a home for them. He did not intend to leave it so Mr. Lucas could have anything to do with it; that it was left all in her hands, and he intended helping her all he could to get her a good home and satisfy her."

This, it will be seen, was shortly after the change in the lease from the husband to that of the wife, and shows the design and understanding of R. N. S. as to that change.

The defendant for the same purpose of showing the interest of his wife in the land, and the character of their occupancy, offered in evidence a letter bearing even date with the will of R. D. Shepherd, written by him, and addressed to the devisees in his will, which the Court permitted to be read in evidence only for the purpose of showing the intention of the executors in executing the lease to Catharine S. Lucas, to which restriction of the Court the defendant excepted. (See pp. 58 to 61.)

The defendant for the purpose last stated, and to show the recognition of the plaintiff that his wife had, and controlled the possession of the farm, by the service of a notice upon her the year previous to the one given in evidence by the plaintiff, and a subsequent waiver thereof, offered in evidence a transcript of a record from the Circuit Court of Jefferson County, duly certified, in a proceeding in forcible detainer in the case of P. C. Brooks, Jr. *vs.* R. A. Lucas, which contained as the foundation of the suit a notice of the plaintiff upon defendants wife, dated March 16, 1867, and notifying her that she would be required to surrender possession of the premises and remove therefrom on the 1st of April 1868. To this transcript the plaintiff objected, and the objection was sustained and the transcript was excluded from the jury, to which the defendant excepted, (see p. 61 to 63.) It will be recollected that the plaintiff proved that the defendants *wife* had afterwards paid the rent for that year, and that defendant has ever since refused to pay rent. (See p. 22.)

The defendant also gave in evidence, without objection, two transcripts of records from the same State Courts, marked "Q" and "R," showing that the plaintiff had distrained for the rent due for the years ending 1st day of April, 1869 and 1870, through William A. Chapline, as his agent, whose agency was not disputed, and the proceedings were still pending. (See p. 63 to 67.)

The defendant also proposed to give in evidence another transcript of a distress warrant and forthcoming bond, for the rent for the year ending April 1, 1871, which was commenced by the plaintiff, as shown by said record, upon an affidavit of the same Wm. A. Chapline, as his agent, by which the rent was secured, and which proceeding was still pending. This transcript was objected to by the plaintiff, because it was not properly certified under the seal of the Court; whereupon,

the objection was sustained and the transcript excluded by the Court, to which ruling the defendant excepted. (See p. 67 to 69.) The defendant then gave oral evidence tending to prove the same facts shown by said transcript, to which no objection was interposed; but the plaintiff gave evidence tending to prove that he had not authorized said Chapline to issue said distress warrant. (See p. 69.) The defendant also gave in evidence, (to show that the legal title was not in the plaintiff,) two deeds of trust with the bonds secured by them, executed by Edward Lucas with his wife, whilst he was the owner of the land, one to R. H. Lee, the other to Henry Berry, to secure said bonds of Edward Lucas, to Saurwien and Douglass, which had been assigned by them to R. A. Lucas, and by him to James H. Shepherd, trustee, for the sole and separate use of Catharine S. Lucas. (See p. 69 to 75)

The representatives of these deeds of trust were not made parties in the Chancery proceeding of Towner's administrator *vs.* Lucas' executor, &c., and the trust deed to Henry Berry, covering a part of the land having been executed and recorded in the spring of 1843, had priority over either of the judgments set up by the complainant in that suit. The claims secured were, however, audited in that case. (See p. 13 and 14.)

The testimony having been closed, the defendant asked for four separate instructions, which were severally refused by the Court to which several refusals the defendant excepted. These instructions are found on pages 75, 76 and 77, as follows:

"If the jury finds from the evidence, that Wm. A. Chapline, Esq., was the agent of the executors of R. D. Shepherd, and of the plaintiff, for the care, superintendence, and management of the farm in controversy, and the receipt and collection of the rents; and that he has caused distress warrants to issue for the collection of the rents for the years ending on the first of April, 1869, and April 1st, 1870, which are still pending and undisposed of in the circuit court of Jefferson County, West Virginia; and that since the first day of January, 1871, the said William A. Chapline as such agent of the plaintiff, has, in the name and on behalf of the plaintiff, caused a distress warrant to issue for rents claimed to have accrued from April 1st 1870, to April 1st 1871, which has been levied on property of the defendant, and that the defendant has been required and compelled to give a forthcoming bond for the delivery of the property so levied on when the same may be required, to satisfy any judgment that may be rendered in the proceedings on said distress warrant, and that said proceedings are still pending in the circuit court of Jefferson County, of West Virginia, then such proceedings constitute a waiver of the notice to quit, offered in evidence by the plaintiff, and the jury shall find for the defendant.

And the plaintiff having offered evidence tending to prove that the said William A Chapline was not authorized to issue a distress warrant for the collection of the rents accruing from April 1st, 1870, to April 1st, 1871 and that Cha's J Faulkner, Esq., attorney for the plaintiff, had expressed his disapprobation of the act of said agent in issuing said last mentioned distress warrant, the defendant moved the court to instruct the jury as follows to wit:

"No expression of disapprobation on the part of the plaintiff or his attorney of the act of the agent of the plaintiff in issuing the distress-warrant mentioned in the last instruction can defeat the operation of said warrant in waiving the notice to quit, so long as proceedings on said distress-warrant are pending, and the plaintiff holds the forthcoming bond for the property levied on."

And the defendant having offered evidence to prove that Edward Lucas, in his life-time had executed two deeds of trust to secure the payment of certain debts therein described, the defendant moved the court to instruct the jury as follows to wit:

"If the jury believe from the evidence that there is an outstanding deed of trust, dated on the 18th day of February, 1847, conveying the legal title to the farm in question to R. H. Lee in trust to Peter Sauerwein, and that neither he nor ses uique trust nor any one entitled to receive payment of said debt so secured were made parties to the suit of Towner's adminis rator vs. Edward Lucas, executor, & others and that said outstanding lien was of older date than the lien of Towner's judgment, to enforce which said suit was brought and that said first mentioned lien is still subsisting and unpaid, they will find for the defendant."

And the defendant further offered evidence to prove that the said Edward Lucas, in his life-time, to wit, on the 6th day of April, 1843, executed a deed of trust on the premises in controversy, conveying to Henry Berry the legal title thereto, to secure a debt due from the said Edward Lucas to Robert Douglass, and that the said debt still remains unpaid and has been assigned to James H. Shepherd, as trustee for Catharine S Lucas, whereupon the defendant requested the court to charge the jury as follows, to wit:

"If the jury find from the evidence that the debts secured by the deeds of trust from the said Edward Lucas to R. H Lee & Henry Berry, were assigned to Jas H. Shepherd as trustee for Catharine S Lucas, and that the said Rezin D. Shepherd was not the owner of said debts, at the time of the sale under the decree of the circuit court of Jefferson County, that proceeding cannot defeat the title of the trustees to the deeds of trust to secure their payment, although they may have been audited and credited to him in that proceeding, unless the said James H. Shepherd and Catharine S. Lucas were parties to that proceeding."

And thereupon the Court, on its own motion in lieu of instructions, offered by both parties, instructed the jury as shown on pages 77 and 78, which instructions were as follows:

The court instructs the jury that the will of R. D. Shepherd grants the land in controversy to the three devisees and legatees, Ellen Brooks, P. C. Brooks, jr., and Shepherd Brooks, and that the sealed letter accom-

panying said will, bearing date September 1st, 1859, in no wise alters or modifies it, and creates no new estate in any one, and it having been produced at the instance of the defendants, and by them offered in evidence, they are bound by its contents, and are not permitted to impeach the correctness of its statements.

The court further instructs the jury that the letter of P. C. Brooks jr., and Shepherd Brooks, bearing date November 29th, 1865, addressed to Mrs. Catherine Lucas, the wife of the defendant in this cause, and her reply of December 11th, 1865, and the subsequent agreement by letters changing the time of the commencement of the lease from the 1st of January to the 1st of April, as well as the time of the payment of the rents from the 1st day of January to the 1st of December, constitutes a lease of the premises to her by them, which she may take, but being a married woman, by operation of law, the lease becomes the absolute property of her husband, and thereby creates the relation of landlord and tenant between him and the lessors; and the fact that no particular time is mentioned in the contract of lease, when such relation should cease between the parties, taken in connection with the fact, that the plaintiffs reserved in the contract the right to increase the rent thereafter, or to make other changes in it, upon giving one year's notice, creates a tenancy from year to year, which may be terminated upon one year's notice as prescribed by said contract of lease.

The relation of landlord and tenant, having been established, as set forth in the preceding instruction, the tenant is estopped from denying his landlord's title.

Any the fact that there were outstanding liens upon said land, or that the defendant was in possession of the same at the time that the testator, R. D. Shepherd, became the purchaser under the decree of the circuit court of Jefferson County, at the suit of Towner's adm'r vs. Edward Lucas' ex'or et al., does not warrant the defendant, under the circumstances of this case, in disclaiming his landlord's title.

That, before the plaintiff can recover, the jury must be satisfied that the notice required by the contract of lease was given, and, if given by the plaintiff, and there was afterwards a distress-warrant sued out to recover rent due and in arrear for the leased premises, in favor of the plaintiff by his agent Chapline, the presumption of law would be that it was sued out with the assent of the plaintiff, in which event he could not maintain this action, unless the evidence satisfies the jury, that the agent Chapline exceeded his authority in suing out such warrant, acting without the knowledge or consent of his principal, after his principal, the plaintiff, had, by notice according to the contract of lease, terminated the tenancy, in which event he would be entitled to recover."

To which instructions the defendant excepted.

Assignment of Errors Relied Upon.

First. The Court below, erred in ruling out the testimony by deposition of Catharine S. Lucas. (See page 28.)

Second. The Court erred in sustaining the objections of the defendant in error to the testimony and depositions of Robert Lucas, Robert A. Lucas, James A. Shepherd, J. P. A. Entler, I. P. Chapline, A. R. Boteler and Moses Whiting, contained in pages 28 to 58, printed record, so far as said depositions tended to prove that Catharine Lucas derived title to the property in controversy under the will of R. D. Shepherd, and so far as they refer to conversations and other verbal statements held between the said witnesses and R. D. Shepherd, concerning his purposes as to said farm. (See p. 58.)

Third. The Court erred in its restriction as to the letter of R. D. Shepherd of Sept. 1, 1859, addressed to his daughter and grand children, which is found on pages 58 to 61, by permitting it to be read in evidence only for the purpose of showing the intentions of the executors in executing the lease to Catharine S. Lucas. See page 61.

Fourth. The Court erred in sustaining the objection of the plaintiff below, to the transcript of a record from the Circuit Court of Jefferson County, West Virginia, in forcible detainer wherein said Peter C. Brooks, Jr., was plaintiff, and Robert A. Lucas, defendant, found on page 61 to 63, and in excluding the same from the jury. (See page 63.)

Fifth. The Court erred in excluding from the jury upon the objection of the plaintiff below, the transcript of a distress warrant, and forthcoming bond in the suit of P. C. Brooks, Jr., against R. A. Lucas, &c., found on pages 67 to 69. (See page 69.)

Sixth. The Court erred in each of its several refusals to instruct the jury as moved by the defendant below in his four several instructions asked for, which are set forth on pages 75 to 77. For a subdivision of this assignment see "brief."

Seventh. The Court erred in giving the instructions which were given to the jury on its own motion, in lieu of other instructions asked for by the parties which are found on pages 77 and 78. For a subdivision of this assignment, see "brief."

Eighth. The Court erred in overruling the motion of the defendant below to set aside the verdict, and for a new trial for the reasons set forth in the written motion and found upon page 78.

Ninth. The Court erred in admitting the deed from Ellen Brooks and Shepherd Brooks to the plaintiff, (see p. 19 to 21,) because the seizin (legal title,) was under the will in the *executors*, and remains there, and which the plaintiff by joining with his co-executor in the lease to defendant's wife was estopped from denying.

Tyler on Eject, 482. 6 Peters, 383-4.

Brief for Plaintiff in Error.

AS TO THE FIRST ERROR ASSIGNED.

Was the testimony of the wife of the defendant, who was the real party in interest, taken and offered by the husband, properly excluded as incompetent.

By the act of Congress of July 2, 1864, (13 Stat. at Large, 351) it is enacted. "In the Courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in the issue tried." (See 9 Wall 655.) A similar provision as to the interest of a witness is found in the Code of West Virginia, p. 619, Sec. 22, and p. 620, Sec. 24, and as to parties on p. 619, Sec. 23.

The interest of the husband is the interest of the wife. In this case she had a peculiar interest, but there was no contoversy between her and her husband. Was not the testimony of the wife excluded because of her interest in the suit? The act of 1864, has not yet been construed in that respect by this Court. We are aware that in one or two States under statutes somewhat similar, it has been held that the wife is still incompetent as formerly, by reason of public policy. But we cannot see why her testimony should have been excluded in this case, either upon the ground of public policy or domestic peace, because the testimony was given with the assent of the husband, and in entire harmony with his wishes. By admitting it, no confidence would have been violated, and nothing extracted from the wife which

was confided to her by the husband. It had already been taken by deposition, and the husband was fully informed of its character. If her testimony had been offered or required by the plaintiff, there would have been some force in excluding it upon the ground of public policy or domestic peace.

AS TO THE SECOND ERROR ASSIGNED.

We think the restriction placed upon the evidence of the witnesses Robert Lucas, Robert A. Lucas, James A. Shepherd, Entler, Chapline, Boteler and Whiting was improper, and calculated to mislead the jury by reason of its indefiniteness. The restriction was made upon the ground that defendant was estopped from denying the plaintiff's title, or the terms of lease under which he held possession; but which of the leases does not appear, and that the verbal statements of R. D. Shepherd were incompetent because of the written instruments. How much of said evidence was excluded, is uncertain. We claim it was competent generally, and if any portions were incompetent, they should have been specially pointed out and excluded from the jury. The testimony had a bearing upon the questions of possession, how, when, and from whom obtained, under what lease, if any; whether held by the defendant or his wife, as her separate property, whether by an equitable interest in the fee, with the right of possession, or as tenant for years, from year to year. at will or sufferance, or for life. Some of these questions were important to be ascertained by the jury, before the doctrine of estoppel could be applied. As to the law of estoppel bearing upon the case, we refer to the authorities hereafter cited under the seventh error assigned.

AS TO THE THIRD ERROR ASSIGNED.

The testamentary letter of R. D. Shepherd, deceased, of Sept. 1, 1859, the date of his will, we think should not have been restricted as it was, but was competent in connection with the other testimony, to go to the jury to enable them to determine the character of the occupancy of the defendant and his wife, and particularly whether she had a separate interest in the land. The restriction was likely to mislead the jury into the belief that they were required to disregard it for any and every purpose bearing upon the issue, as the mere intentions of the executors in executing the lease to defendant's wife is but little consequence.

AS TO THE FOURTH ERROR ASSIGNED.

The transcript of the record of proceedings in forcible detainer commenced by the plaintiff in 1868, was proper evidence to show that the plaintiff when he gave the notice therein shown, looked upon and treated the defendant's *wife* as the tenant in her own right, by giving the notice to her alone, and the abandonment of the suit when she paid the rent. It was also competent to prove in that way, that a notice to quit for a former year had been waived, as bearing on the question whether the subsequent notices had been waived by the plaintiff. For, if the plaintiff waived the notice for April 1, 1868, upon the receipt of the rent then due, and again for the next two years ending April 1, 1869, and 1870, by securing the same by distraint; it was more probable that he intended to and had waived his subsequent notice for April 1, 1871, by omitting to bring suit for eight and a half months after notice required possession to have been given to him, and also by the distress warrant issued at the instance of W. A. Chapline as his agent.

AS TO THE FIFTH ERROR ASSIGNED.

Was the transcript of the proceedings under the distress warrant of February 10, 1871, in the Circuit Court of Jefferson county, West Virginia, properly excluded, because not certified under the seal of the Court, or because it was certified by a deputy clerk for his principal, instead of by the clerk himself, or because there was no evidence of the official character of the officer certifying it? If it was not, the defendant was greatly injured because it threw upon him the burden of proving the proceeding by parol. If it had been admitted we think the authority of the agent could not have been drawn in question, whilst the plaintiff permitted the proceedings to continue in that Court. He should first have dismissed the proceeding. No other person could take advantage of the want of authority in the agent to bring the suit, and whilst it was pending it was by the plaintiff's authority. He should have shown that he took the earliest opportunity to repudiate the act of his agent by a dismissal of the proceedings.

We understand it to be well settled. that in the Courts of the United States no other certificate or authentication is required, than is required in the Courts of the same State. We append hereto extracts from the

Code of West Virginia, from which it will be seen that the transcript was properly certified, and is made evidence without the official seal. * We also refer to the following authorities:

1 Abbott's, U. S. P. 137, 138, 158.
8 Peters 32, 3 Wall, 636.
8 Wall. 513, 526, 528, 537.
9 Cranch. 122.

AS TO THE SIXTH ERROR ASSIGNED.

1. The first instruction asked by the defendant we think should have been given, because we think the jury from the evidence before them would, and should have found the facts stated therein, that such facts did constitute a waiver upon the part of the plaintiff, of the notice to quit which he had given in evidence.

2. We think the defendants second instruction asked for was proper, for reasons above given under the fifth assignment of error. The plantiff should have repudiated the act of the agent by a positive act, in discharging the forthcoming bond, and dismissing the proceeding.

3. The third and fourth instructions asked for we think should have been also given. They seem to have been refused because the Court was of the opinion that the defendant "under the circumstances of the case" that is, that by reason of some one or more of the leases was estopped denying the plaintiffs title and right of possession, and that the question of estoppel under the facts proved should not be left to the jury, but should be settled by the Court.

For further reasons, and authorities, see next assignment of error.

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*"A copy of any record or paper in the Clerk's office of any Court, or in the Recorder's office of any county, &c., attested by the officers in whose office the same is, may be admitted as evidence in lieu of the original." "Any such copy or certificate purporting to be sealed, or signed and sealed, or *signed alone*, by any such officer, may be admitted as evidence without any proof of the seal or *signature*, or of the official character of the person whose name is signed to it." See Code of West Virginia, p. 615, sec. 5.

"The Clerk of any Court, with the consent of such Court, or of the judge or judges in vacation may appoint any person his deputy." "The deputy, during his continuance in office, may discharge any of the official duties of his principal." Code of W. Va., p. 73, sec. 11.

Any "deputy clerk may administer an oath in any case wherein an affidavit is necessary or proper." Code, 585, sec. 6.

"The records and papers of every Court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof, except in cases where it is otherwise specially provided." Code, 585, sec. 5.

AS TO THE SEVENTH ERROR ASSIGNED.

1. The first instruction given by the Court was erroneous, and calculated to mislead the jury, in saying that the will of R. D. Shepherd grants the land in controversy to Ellen Brooks, P. C. Brooks and Shepherd Brooks.

In whom did the will vest the legal title, or right of possession? Both must be in the plaintiff to entitle him to recover in this action. By the second item of the will, it would seem to be vested in the daughter and grand children in equal proportions. But by the third item it seems to be vested in the executors as such. "Seizin" means the legal title, or lawful right of possession. What else could the testator have meant by the sentence "giving them *seizin* of my entire estate." We think it should be construed as giving them a seizin in fee.

See 1 Blackstone's Com. Book 2 p. 108, note 30; p. 131-2 and 209.

1 Washburn on Real P. p. 29, Sec 11; p. 45-6, Sec. 65 and 70; p. 47-8-9 and 52.

Both clauses should be construed together and reconciled if possible. This can be done by giving to the executors the possession or right of possession and contol for a time, and the legal title, and making the devisees the sole beneficiaries with the right to receive the possession from the executors.

See Lessee of Boyd *vs.* Talbert, 12, O. R. 212.

Sinton *vs.* Boyd, 19 O. S. R. 30, 35 and 490.

If the two clauses cannot be reconciled by reason of being in conflict, then by the rule for construction of wills, the last clause must prevail.

2 Jarman, 741, Rule 7.

Roper on Legacies, 1472; 2 Taunton, 109.

Sheralt *vs.* Bentley, 2 My. and Keene, 149.

The plaintiff below recognized the right of the executors, to rent, control and dispose of the land under the will, by the correspondence with Mrs. Lucas, and the lease in the name of the executor. (See p. 23 and 24.)

Having leased and contracted as executor, the plaintiff in ejectment was estopped from denying the right and title in the executors. The right and title vested in the executors by the will has never passed to the devisees or either of them. That the executors were two of the devisees can have no effect upon the question, which should be decided

as if the executors and devisees were different persons. This might be the case under the will of R. D. Shepherd, by death, resignation or removal.

Another question is raised by the first instruction of the Court. Is a party who offers a paper in evidence bound by all its recitals or contents, and not permitted to impeach the correctness of any of its statements?

We think the law is not so rigorous.

The first instruction was also erreoneous, because it was calculated to mislead the jury, to instruct them as to the effect of the sealed letter in modifying the will of R. D. Shepherd, after having excluded it as evidence for any such purpose, while omitting to instruct them as to the effect of this letter in shedding light on the intentions of the executors, as expressed in their lease to Catharine S. Lucas, for which purpose it was admitted.

2. The Court erred in its second instruction, (see p. 77,) to the jury, that the lease from the executors to Catharine Lucas the wife of the defendant below, (p. 23 and 24,) became by operation of law (by reason of her being a married woman) the absolute property of her husband, and thereby created the relation of landlord and tenant between him and the lessors, &c.

It is submitted that the lease should be construed in connection with the other evidence showing her former interest in the land derived from the testator, and thus construed; the lease to Mrs. Lucas was her separate estate, and not the property of the husband by operation of law or otherwise.

This Court in a recent case held.

"No particular phraseology is necessary to create a separate estate for a *feme covert*. In whatever language expressed, if there is a clear intent of the parties to create the estate, it is created. A lease of land for a term of years on a ground rent, fixed to P. "in trust for J. M. a married woman, her heirs and assigns," with a covenant on the part of the lessor that on payment of a principal sum named, he will at any time, convey the land in fee to the said J. M. her heirs and assigns, cuts off all the rights of the husband in the fee. The covenant to convey passes to the heir of the woman."

Syllabus in Prent *vs.* Roby 15 Wallace 471.

On page 474-5, the Court say: "As in all other cases of instruments to be construed, the controlling test is the intent of the parties. That in whatever language it may be clothed, constitutes the contract."

"No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption and control over the premises after her death was simply usurpation."

The Court below properly held that the letter of the executors, P. C. and S. Brooks to Catharine Lucas, of Nov. 29, 1865, and her reply of Dec. 11, with the subsequent agreement of P. C. and S. Brooks to the slight modificatiou asked for by Mrs. Brooks constituted a lease of the premises to her. The inducement and foundation of that letter of Nov. 29, 1865, were no doubt, the letter of R. D. Brooks, accompanying his will, dated Sept. 1, 1859, and her former lease from R. D. Shepherd, &c. Now, in that testamentary letter of Sept. 1, 1859, he made the following request. "Allow Catharine Lucas my niece to live upon it, (the farm) during her life time, on the condition that she pay a small rent, &c., but don't sell it unless you get the cost, ($24,000.) Then give my said niece $10,000 out of the proceeds, well *secured on her children.*" (See p. 60.) The lease from R. D. Shepherd to Catharine Lucas was made in February, 1861, after the execuli on of the will.

This second instruction is erroneous in several other grounds: 1. It removes and precludes from the consideration of the jury an important question of fact depending upon the interpretation of a series of documents, including the sealed letter; viz: was this a lease from year to year, or for life? 2. The doctrine that "a lease to the wife by operation of law becomes the absolute property of the husband," is erroneous. There must be proof of his *assent* expressed or implied; and his property in it is only *qualified*, there being a right of survivorship in the wife.

~~5 Ran. 574, 8 H. and M. 470. Brooks v. Marbury 11 Wh. 79.~~

3rd. The lease from the executors did not create a tenancy from year to year, and upon this point we call particular attention to that lease, for if our view of it is correct, the plaintiff below could not recover in that action. It should be construed in connection with the other testimony. It recognizes and confirms an existing interest in Mrs. Lucas, other than a mere tenancy at will, sufferance or for years. An interest in the fee, which is to be secured to her for life, and then to her children out of the proceeds of the sale of the farm to the amount of one-half, it being worth from $20,000 to $25,000; and until the farm is sold she is to have the possession upon the payment of a small annual rent.

The executors say: "We have two propositions to make to you either

x Ettig v. Bank U. S. 11 W. 89. 76.

of which you can accept." First, to occupy the place and pay a yearly rent of $600, on the 1st of December of each year, make repairs and pay all expenses except taxes, &c. If the rent should be increased, or any other change made, Mrs. Lucas was to have one year's notice of it in advance. It will be seen that no limit is made to the term, but it contemplates a continuance for years. Power is reserved to increase therent after a year's notice, and also to make other *changes* after a like notice. Does the reservation of the power to make a *change*, authorize a *termination* of the lease, as held by the Court below? We think that the succeeding part of the letter shows that that is not a proper construction, but it means a change in the terms of the lease other than an increase of the moneyed rent, such as a share of the crop, payment of taxes, &c., or at most, a sale of the land and investment of the proceeds, or a part thereof for the benefit of Mrs. Lucas. If this is not the proper construction, how could the second proposition be better for the executors or devisees? By this second proposition, the place was to be sold as soon as convenient, one-half in cash to go to the executors, *the other half* to remain on mortgage in trust for Mrs. Lucas during her life, and then to go outright at her death to her children. Until a sale was made Mrs. Lucas to occupy the premises and pay six hundred dollars rent per annum or at that rate. They advise her to accept the second proposition, as being the best *for all concerned.* They say further that if she should accept the first proposition, and fail to perform her part of it, the property would probably be sold on terms *much less advantageous* to Mrs. Lucas. Why this last sentence if she was to have no interest in the time and the amount of sale? Why, and how would it be much less advantageous? Because, they would probably sell the premises, and they would not be bound to secure one-half the proceeds of the sale upon her and her children, but might only secure to her the $10,000 as requested in the sealed letter of R. D. Shepherd. What else did they mean by this *business* letter? Was Mrs. Lucas to understand, as is now claimed, that by accepting the first proposition she yielded all her interest in the land, and accepted a mere lease from year to year which could be terminated at any time upon a year's notice, when by accepting the other proposition which was said to be better for the executors and devisees as well as for herself, she could continue in the occupancy at the same rent, until the land was sold, and then get one-half the proceeds of the sale, (probably $12,000,) secured absolutely to her and her children? Evidently, she did not so understand it.

The contract is annulled by treating it as one which the executors might determine at their will, or at the end of any year. They could not have maintained an ejectment after the execution of the lease, unless a right of re-entry was reserved upon condition broken, which breach it would be incumbent on the plaintiff to show.

See Hughes *vs.* Trustee of Clarksville, 6 Peters, 383.

The ejectment could not be sustained upon the ground of a forfeiture for non-payment of rent, because the rent was not demanded at the proper time and place.

15 Wallace.

III. The third instruction of the Court is erroneous, because [1,] it touches still further on the province of the jury; it declares that the relation of landlord and tenant *has been established*, [proved,] and that the tenancy is *established*, [proved] to be from year to year; [2.] There being here no *entry* under or by virtue of the alleged lease, which was at least but an acknowledgment of tenancy by one previously in possession, the Court should have so qualified the application of the doctrine of *estoppel* as to have allowed the jury to determine whether the acknowledgment of tenancy was not procured by fraud or undue influence, or made by mistake, or through ignorance. [See pr. R. p. 22.

Alderson v. Miller, 15 Grat. 279.

Hughes v. Trustees, &c., 6 Pet. 369.

Tyler on Eject, p. 922.

Jackson v. Leak, 12 Wend.

Taylor, Sec. 706 and 707.

[3.] A lease by a *feme covert* does not work an estoppel.

Bacons, Abridgement, Title, Lease, O., p. 442.

3 Danna, 289; 13 Pick. 116: 15 Mass, 495.

19 O. S. R. 514; 1st Wash. on R. P. 400, and Vol. 2, p. 75, 107.

Tyler on Inf. and Cov. 702, 726-7, 731, 733 and 754.

[4.] If the defendant was estopped under the lease of 1865, the plaintiff was also estopped by the same instrument from denying title in the executors.

6 Peters, 383, 384.

IV. the fourth instruction of the Court is erroneous, because [1.] an outstanding unsatisfied mortgage is a good defence in an action of ejectment, when the defendant has an equitable title.

Peltz. v. Clarke, &c., 5 Pet. 481.

Marsh *vs.* Brooks, 8 How. 223.

[2.] The Court repeats the error of deciding upon the "circumstances [facts,] of this case," which ought to have been left to the jury, as we have seen.

V. The fifth and last instruction embraces two very subtle, and therefore very dangerous errors: (1). It is admitted that a distraint, after a notice, is a *waiver*. The evidence tended to show that W. A. Chapline was the plaintiff's agent to collect the rent, authorized to distrain if necessary; that he had distrained after this suit was instituted for rent accruing after the date of the writ; this threw on the plaintiff the burden of proving a revocation of the authority; the Court relieves him of this burden, by instructing the jury that they may consider the institution of the suit as in itself such a revocation; this is reasoning in a circle, and erroneously.

(2). If the first part of this instruction is correct, the last part is erroneous, for there is a manifest contradiction.

(3). The defendant offered evidence tending to show a subsequent ratification and adoption of the act of the agent by the principal. This instruction cuts the jury off absolutely and imperatively from considering the question of subsequent ratification and adoption.

(4). We claim the notice by the plaintiff alone and individually, was not sufficient, (if a notice to end the lease would have been proper in any manner,) because the lease was made by *two* lessors as executors, and the notice should have been given by the same persons, in the same character.

1 Washburn on R. P., 525, sec. 15.

(5). If the notice was sufficient, the plaintiff had waived it.

"A notice to quit may be waived by receiving rent accruing subsequent to the expiration of the notice, or by distraining for such rent, or giving a new notice to quit at a time subsequent to the first."

1 Wash. on R. P., 524, sec. 11.

Taylor on Landlord and Tenant, sec. 485.

19 Wend., 391. 1 Henry Blackstone, 311.

6 Term. Rep., 219. 6 Cush., 415.

It was waived by omitting to bring suit for eight and a half months after the expiration of the time for yielding possession.

"At the expiration of the time specified in the notice to quit, the landlord is in precisely the same situation as he would have been at the end of the year, if the tenancy had been expressly for a year, and he may at once proceed to take possession, or, if necessary, commence an action for the recovery of the premises. If, however, he omits to commence proceedings to eject the tenant for any *considerable space of time*, after the period limited by his notice, or if he again collects rent which accrued subsequently thereto, he must give fresh notice before he can take pro-

ceedings to dispossess the tenant, for the expiration of the notice is equivalent to the expiration of the lease, and after this time a new tenancy will be deemed to have commenced."

Taylor, sec. 487. 11 Wend., 616.

13 Metcalf, 273.

As to the eighth error assigned :

The verdict should have been set aside, because of the errors of the Court hereinbefore mentioned. Secondly, because it did not comply with the law prescribed by the Code of West Virginia, for such cases, by specifying the estate found in the plaintiff, whether it be in fee or for life, &c. See Code of West Va., 521, sec. 27.*

Thirdly, The verdict was contrary to the evidence and the law, and the defendant would have been entitled to a verdict on a demurrer to the plaintiff's evidence, because; the plaintiff declared against the husband only; he proved a lease to the husband & wife, under which a holding over became a joint trespass, and they should have been sued *jointly;* the plaintiff having sued but one, proved himself out of Court.

Respectfully Submitted,

C. W. B. ALLISON,
DANIEL B. LUCAS,
Attorneys for Plaintiff in Error.

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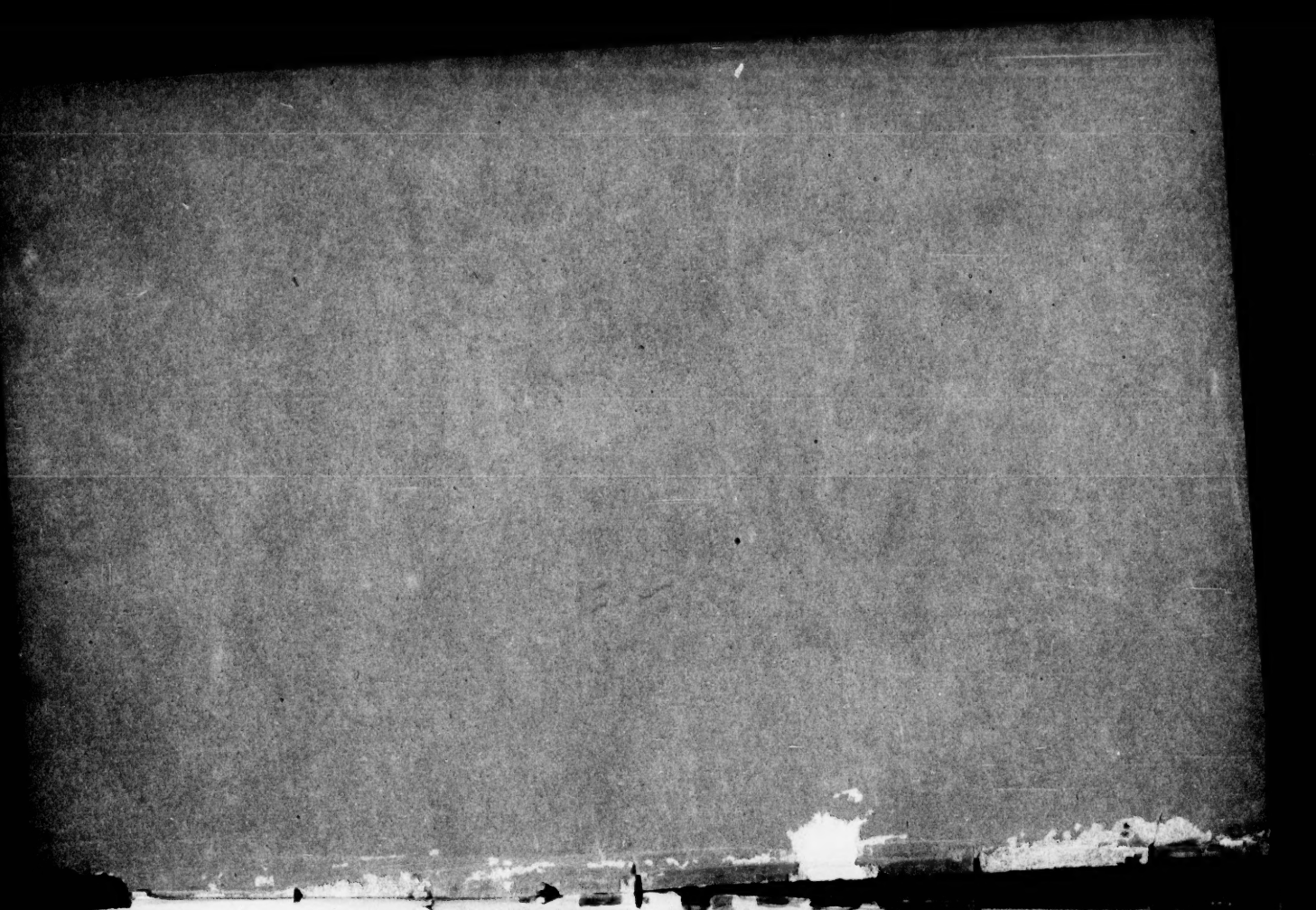
*NOTES.—"The premises claimed shall be described in the declaration with convenient certainty, &c. "The plaintiff shall also state whether he claims in fee or for his life, or for the life of another, or for years, specifying such lives, or the duration of such term; and when he claims an undivided share or interest, he shall state the same." CODE, 519, sec. 8 and 9.

"If the verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be for a term of years, and specifying the duration of such term." CODE, 521, sec. 27.

* See the Notes R. 22.
Reeve's on Dom. Rel. 135



Judge Davy.

8th

ROBERT A. LUCAS, plaintiff in error,

vs.

PETER C. BROOKS, defendant in error,

IN THE

SUPREME COURT

of the

UNITED STATES.

Supplemental note of argument for the plaintiff in error:—

I. After admitting the distress warrants of previous years, the Court below excluded that for the year 1870, which was sued out *after* the date of the writ in this suit.

It is difficult to conceive on what ground such exclusion was based, as no reason is assigned in the record (see pages 68-69 of printed record).

If it were on the ground that the attestation is by the deputy, and not the clerk himself, the ruling was erroneous. Cooke vs. Hunter, 2 Overton, 113.

Cooke v. Hunter 2 Overton 113.

The reasoning in the above case—that what one does through another, he does himself—is entirely applicable to our case, for, in the State of West Virginia, to invalidate all official acts of clerks, performed through deputies, would destroy more than half the records in the State. If the reason of exclusion were the want of the *seal of the court*, the ruling was erroneous, for the State law, as stated in our brief, does not require the seal: Code of W. Va., p. 615, sec. 5.

Code W. Va. p. 615, sec. 5.

It must be admitted, we think, that to exclude the warrant of distress of 1871 was erroneous; and the question remains, did this ruling of the court result in *substantial injury* to the appellant? If so, we are entitled to a new trial. 2 Abbott's U. S. Prac.

As a general rule, when the Court erroneously excludes primary evidence, and a party is driven to prove the same facts by secondary and inferior testimony, he is substantially injured. For example, I offer your deed to establish a debt; you are estopped to deny its recitals; but the Court erroneously excludes it, and I am driven to resort to parol testimony: am I not necessarily injured?

2 Taylor on Ev. sec. 1682.

De Rutzen v. Farr 4 A. & E. 53.

The case under consideration is precisely analogous. We desired to prove a pending suit for rent; we offered a *record*,

Railway v. Hearne 32 Texas 546.

which was erroneously excluded on a question of authentication, and we were driven to examine the plaintiff's agent. Were we not injured? It seems difficult to conceive a case of more palpable and substantial injury.

II. Let us submit to analysis the letter of November 29, 1865, upon which the Court based its second instruction, and see whether it has been properly construed by the Court below. And having considered this letter independently, let us place in juxta-position the sealed letter which accompanied R. D. Shepherd's will. See pr. R. pp. 23 & 58.

The former letter (November 29, 1865) commences, as follows: "As Executors of the estate of R. D. Shepherd, we address you."

Now, does not this offer, made as *Executors*, naturally cause us to recur to the *will*, whence all their representative authority was derived? But, upon recurring to the will, as probated, we find no such authority as this letter would indicate. They are, it is true, given "seizen of his whole estate"; but this clause would confer no authority to settle one-half the value of this farm on a stranger, nor to lease it to her indefinitely from year to year. We must look beyond the formal will for any such power in the executors. We find it in the letter accompanying the will, and bearing even date. That letter says: "As to the plantation in this county belonging to me, and known as the Lucas farm, allow Catharine Lucas, my niece, to live on it during her life time, on the condition that she pays you a small rent of 3 and 4 per cent. on its cost, which is $24,000; but don't sell it, unless you can get the cost; then give my said niece $10,000 out of the proceeds, well secured on her children." Here then, we have the key to the action of the executors. Here is the authority under which, as executors, they were proceeding to dispose of the Lucas farm. Here is the *trust*, which the executors (who are also, with Ellen Brooks, the only devisees) accepted, in favor of Catharine Lucas, and which they proceeded to execute. It matters not, as far as the present question is concerned, whether this letter were mandatory, or only advisory. The present question is: Did the executors *intend*, in their letter to Catharine Lucas of November 29, 1865, to offer to her, substantially, the alternative propositions which the sealed letter sets out? Did they mean to say to her: *First*; we will allow you to remain on the farm, during your life time, on the condition that you pay to us, or our agent, the yearly rent of $600 on the 1st day of December of each year, the lease to begin January 1st, 1866; if the rent should be increased, or any other change made in the terms of payment, or amount of rent, you to receive one year's notice of it in advance: or, *second*; The place to be sold as soon as convenient, to be paid for, one half in cash, (to come to us) the other half to remain on mortgage, which will be put in trust for your benefit during your life, and go to your children outright at your death, meanwhile, until the sale we expect you to pay rent.

If *this* be the correct construction of the letter of November 19, 1865, the District Court erred in pronouncing the lease and from year to year only.

But if we be wrong; still, was not this duty of construing and comparing separate papers, with a view to extract therefrom the true intent of the contracting parties, a labor for the *jury*, of which the Court could not relieve them? Did not this *duty*, if it devolved upon the jury, correspond to a *right* on the part of the appellant, of which the District Court erroneously deprived him? [illegible] (4).

III. The Court below erred in its application of the doctrine of Estoppel, in the third and fourth instructions.

Let us examine the reason of the rule as between Landlord and Tenant, and we shall then be enabled to decide upon the extent of its application. The doctrine seems to be this: A party who *acquires possession* under a lease cannot, in general, dispute the title of the lessor, either by attorning to another, or by setting up title in himself. The rule is founded on the importance which the law attaches to good faith. Where, however, there is no deed, there is no *technical* estoppel; and where possession is not derived from the lease, a mere acknowledgment of tenancy is no *equitable estoppel*. The moment such an acknowledgment is presented, it becomes important to understand the circumstances and influences which surround the parties, whether the alleged landlord has been placed in any worse position, and whether, all things considered, the supposed tenant, by such acknowledgment, ought to be precluded from asserting a superior title in himself. A married woman, let us suppose, has title outstanding in a trustee for her use to a farm in the possession of herself and husband, and, under a threat by an adverse claimant to sell the premises over her head, she acknowledges that she is his tenant, and he then seeks to eject her and her family, is she precluded to assert title in her trustee? Not technically, for there is no deed; not equitably, for she is not indebted to the instrument, nor to the claimant for possession. Such an acknowledgment, like a receipt, or acknowledgment of debt, not under seal, may be traversed, explained, and overthrown. And if the married woman may do so, under such circumstances, why may not her husband? Nor can it be contended that the decree and sale by a special commissioner invested R. D. Shepherd with possession, as against Catharine Lucas.× For example, A has a first mortgage from B, and, after forfeiture, is placed in possession; C has a second mortgage and brings suit to foreclose: he does not make A a party, nor take any notice of A's first lien, or possession; there is a judicial sale in the suit, and C buys the property, can he, under such circumstances, turn A out of possession? Now, this example illustrates precisely the relations in which Catharine Lucas and R. D. Shepherd stood, respectively, to this farm. She owned the Towner judgments, and the Douglas debt, and the Sauerwine lien; and yet

× Gray v. Brignardello 1 Wall. 627.

33 Cal. 45
19 " 410
20 " 317

2 B. Monroe 457.
2 Hen. 43.

neither she, nor her trustee, nor Douglas, nor Sauerwine, were made parties to the suit of Towner's administrator vs. Lucas's administrator. Her rights, therefore, stood unimpaired by the decree and sale in that suit. Her acknowledgment of tenancy must be construed with reference to these facts and viewed under the light reflected from the character of R. D. Shepherd, who was imperious and dictatorial, (pr. R., p. 57) and often seemed not only desirous to retract those interests which he had formerly permanently bestowed, but even bent upon usurping these rights which Catharine Lucas had derived from independent sources.—We refer to the following authorities, not before quoted, for our positions as to estoppel: Taylor on landlord and tenant; secs. 705 6-7. Emerich, &c., vs. Tavener, 9 Grat. 223. In this case (Emerich vs. Tavener,) Judge Lee says: "Nor can he (the tenant) be permitted to deny that the *possession so received* was the possession of his landlord."

f. r. 57

In Creigh vs. Henderson, 10 Grat. 131, the rule is thus laid down: "He (the tenant) cannot deny the title *under which he entered*."

In *Willison vs. Watkins*, 3 *Pet.* 53-54, the rule is expressed by Judge Baldwin as follows: "Where a defendant *enters under a plaintiff*, he shall not dispute his title." So in Mitchell vs. Baratta, 17 Grat. 449, Judge Moncure states the rule: "The tenant cannot dispute the landlord's title, but *having received possession from him*, is bound to restore it at the termination of the lease."

In Hughs vs. Trustees, &c., 6 Pet. 369, Chief Justice Marshall said that an agreement, the legal effect of which is to create a tenancy from year to year, is no *estoppel*, unless the *intention* of the parties is to establish such relation.

IV. The plaintiff below (Brooks) introduced testimony to show that Catharine Lucas, wife of the defendant below, paid rent for the year 1867 and 1868, but had refused since to pay rent. The appellant, in order to explain this failure to pay rent, offered the record of an action of forcible entry and detainer, (pr. R., pp. 61) commenced by Brooks in 1867, and the Court excluded it without assigning any reason. Was it not legitimate to show, in this way, that our failure to pay rent was attributable to an attempt to evict? If so, the Court erred in excluding this record.

f. r. 61

C. B. W. ALLISON,
DANIEL B. LUCAS.

Supreme Court of the United States.

ROBERT A. LUCAS, Plaintiff in Error,

vs.

PETER C. BROOKS, JR.

CHARLES J. FAULKNER, for Defendant in Error.

Pearson, Printer, corner 9th & D sts., Washington, D. C.

Supreme Court of the United States.

ROBERT A. LUCAS, Plaintiff in Error,

vs.

PETER C. BROOKS, Jr.

CHARLES J. FAULKNER, for Defendant in Error.

Statement of the Case.

This was an action of ejectment brought by Peter C. Brooks, Jr., a citizen of the State of Massachusetts, in the District Court of the United States for the District of West Virginia, against Robert A. Lucas, to recover a tract of 293¼ acres of land situate in the county of Jefferson, West Virginia. The legal title of the plaintiff to the premises in controversy is thus deduced:

This land, so far as it is necessary to trace the title back in this case, was the property of Edward Lucas. On the 19th of September, 1848, he with his wife joined in a conveyance of that land to his son, Robert A. Lucas, for the consideration stated in the deed of $15,000.00. In October, 1849, Edward Lucas died, leaving a will, in which he also makes a reference to the sale made to his son, Robert. It is obvious that this sale from the father

to the son was made without any real consideration, and was only designed to arrest and embarrass the enforcement of the liens then existing against it—for those liens far exceeded in amount the nominal price of the land—and was subsequently treated by all parties, the vendee included, as in fact no purchase at all. In April, 1858, the administrator of Benjamin T. Towner filed a bill in the Circuit Court of Jefferson County to subject that land to three judgments which he had recovered in that court in the years 1844, 1845, and 1846, and which were thus liens upon said land at the period of the pretended conveyance aforesaid. To this bill the executor of Edward Lucas, and all his heirs-at-law, including Robert A. Lucas, were made parties. Answers were filed on behalf of the infant defendants by a guardian *ad litem*, and also by Robert A. Lucas, which will be more particularly referred to hereafter. At the October term, 1858, of that court, an interlocutory decree was rendered, referring the cause to a commissioner to ascertain and report the real estate of which Edward Lucas died seized, with all the liens upon the same. At the April term, 1869, the commissioner returned his report, exhibiting the fact that the liens by trust deed and judgment, all prior to that pretended sale, amounted to $26,313.91. At the May term of the same year, no exceptions having been filed to said report, it was confirmed, and a decree rendered appointing a commissioner, on behalf of the court, to make sale of the land. The land was accordingly sold by the commissioner of sale at the price of $80 per acre, the purchase money amounting to $23,459.00. As Rezin D. Shepherd had become the purchaser and assignee of all the liens upon this land

prior to its sale, he was required by the court to pay simply the costs of sale, amounting to $519.44, which, deducted from the gross amount of sales, left $22,939.56, less $72.42, the costs of the suit, to be credited to the aggregate amount of the liens on the land. The sale was confirmed without exception, and a deed executed by the special commissioner to the purchaser, Rezin D. Shepherd. A subsequent report of the commissioner ascertains the indebtedness of the estate of Edward Lucas to the assignee of those liens to be $2,440.73, with interest on part thereof from the 6th of August, 1859, after applying the net sales of the land to the payment of those liens. It also ascertains the indebtedness of Robert A. Lucas to Rezin D. Shepherd to be $2,101.72, with interest on $1,532.97 from the 1st day of March, 1859, and decrees were rendered in favor of Mr. Shepherd for the payment of those respective balances. Attention is here invited to this last decree, because of the singular use sought to be made of it in a subsequent part of this record. In November, 1865, Rezin D. Shepherd departed this life, leaving a will, by which he devised all his real estate to his daughter, Ellen Brooks, and her two sons, Peter C. Brooks, Jr., and Shepherd Brooks. On the 19th of May, 1866, Ellen Brooks and Shepherd Brooks conveyed all their interest in the land now in controversy to Peter C. Brooks, Jr., the plaintiff in the action of ejectment before referred to.

It is now necessary to trace the disposition of that land, from the time of its purchase by Rezin D. Shepherd, in 1859, to the commencement of the action of ejectment. On the 6th day of August of that year the land was leased by Mr. Shepherd to Robert A. Lucas, originally

upon the terms of rendering as rent a portion of the crop, and subsequently modified, by consent of landlord and tenant, by the payment of a money rent of $833.33. The plaintiff in error, Robert A. Lucas, continued to occupy this land as the tenant of Mr. Shepherd until the death of the latter. In November, 1865, Peter C. Brooks and Shepherd Brooks submitted to Catharine Lucas, the wife of Robert A. Lucas, two propositions: the first, to occupy the farm as a tenant, paying a rent of $600 *per annum;* or, secondly, to have the land sold, and to secure to her and her children one-half of the proceeds of the sale of the land. In December, 1865, Mrs. Lucas indicated her preference of the former of these two propositions, and agreed to become the tenant of the estate at the annual rent of $600. That rent was regularly paid in 1867 and 1868, when, the tenant refusing further to pay rent, proceedings by distress warrant were resorted to, to enforce the collection of the rents, and notice given to terminate the tenancy on the 1st of April, 1870. Refusing to surrender possession of the land, an action of ejectment was brought to recover that possession, and in May, 1871, a verdict was found in favor of the plaintiff in ejectment, and judgment rendered accordingly.

Alleged Points of Error.

First.—That the court erred in admitting as evidence before the jury the record of the suit in chancery of Towner's Adm'r vs. Lucas, under a decree in which cause Rezin D. Shepherd, the ancestor of the plaintiff, became the purchaser of the land in controversy. In

Baylor's Lessee vs. Dejarnette, 13 *Grat.*, 163, the court decides that the record in the chancery cause is legal evidence for the defendant as a link in the chain of title, although the plaintiff was not a *party* to the cause. But, in the record referred to, Robert A. Lucas was a party.

Secondly.—It is said the court erred in excluding the testimony of Catherine A. Lucas, wife of Robert A. Lucas. This evidence is inadmissible upon every common-law principle, and there is nothing in the laws of Congress, or in the Statutes of West Virginia, which makes a married woman a competent witness in such a case. On the contrary, the Code of West Virginia of 1868, chapter 130, under the head of "Competency of Witnesses," page 620, section 23, paragraph 5, declares that "a wife shall not be examined for or against her husband, except in action or suit between husband and wife," and the act of Congress of the 6th of July, 1862, declares that "the laws of the *state* in which the court shall be held shall be the rule of decision as to the *competency* of witnesses in the courts of the United States in trials at common law, equity," &c.

Thirdly.—A *femme covert* is as competent to take a lease as a *femme sole*. The husband's express assent is not necessary, as the estate vests till dissent.—(1 *Platt on Leases, page* 66, and cases there referred to; *Comyn on Landlord and Tenant, page* 49; *Woodfall on L. and T., page* 66; *Hunter on L. and T., page* 181.)

Fourthly.—The husband, upon marriage, becomes possessed of the *chattels real* of which the wife is or may be

possessed during the marriage, although the law gives to him a qualified title only in these; that is, an interest in his wife's right, with a power of alienation during coverture. Chattels real are such as annex to or savor of the realty, as terms for years of land, leases and mortgages; and the effect of marriage at common law is to vest in the husband all these interests of the wife during coverture. He has the power to sell, assign, mortgage, or otherwise dispose of those interests as he pleases, by any act in his lifetime, without the consent or concurrence of his wife.—(*Tyler on Infancy and Coverture, page* 368, section 238; *Sir Edward Turner's case*, 1 *Vernon*, 7; 2 *Kent's Com.*, 134.)

Fifthly.—If the relation of Robert A. Lucas to the property in question be that of a tenant under a written lease, as is here undeniably the case, it is not necessary to prove the landlord's title to the demised premises, for the landlord's title is admitted by the tenant when he takes a lease from him, and he is estopped from denying or controverting such title. No third title can be purchased by a tenant and made use of to defeat that of the landlord. If the tenant, after renting the premises, acquires rights adverse to his landlord, he is bound to surrender the property before he can be permitted to assert them.—(*Emerick vs. Taverner*, 9 *Grat.*,237–8; *Wilison vs. Watkins*, 3 *Peters*, 43; *Peyton vs. Stith*, 5 *Peters*, 485; *Walden vs. Bodley*, 14 *Peters*, 156; *Tyler on Ejectment and Adverse Enjoyment, page* 549.)

Sixthly.—The court did not err in refusing the instruction asked for on page 76 of the record, which was as follows: "If the jury believe from the evidence that there is an outstanding deed of trust, dated on the 18th day of February, 1847, conveying the legal title to the farm in question to R. H. Lee, in trust for Peter Sauerwein, and that neither he, nor *cestui que trust*, nor any one entitled to receive payment of said debt so secured, were made parties to the suit of Towner's Administrator vs. Edward Lucas' Executor and others, and that said outstanding lien was of older date than the lien of Towner's judgment, to enforce which said suit was brought, and that said first-mentioned lien is still subsisting and unpaid, they will find for the defendant." This instruction was properly rejected, *first*, because not only not based upon the evidence, but it assumed a state of facts in direct conflict with the admitted evidence in the cause, the records showing that the judgments of Towner were all prior to the execution of said trust deed, and that the debt due to Sauerwein had been fully paid to his assignee, Shepherd, in the sale of the land. *Secondly*, because it would have submitted to the jury a question of the validity of the plaintiff's title, which the defendant, as a tenant, was estopped from controverting. *Thirdly*, a *cestui que trust*, after the purposes of the deed have been satisfied, may maintain ejectment upon a demise in his own name, although the *legal* estate is still in the trustee.—(*Hart vs. Knott*, *Coup. R.*, 46; *Hopkins vs. Ward*, 6 *Munf.*, 38; *Hopkins vs. Stephens*, 2 *Ran.*, 425.) In the first case cited, Lord Mansfield says:

"One objection which has been taken is, that the legal

estate is in the trustees, and, therefore, the heir-at-law cannot recover in this ejectment. In answer to that objection, it has often been determined that an estate in trust merely shall not be set up against him; anything shall rather be presumed; nor shall a man defend himself by any estate which makes part of the title of the lessor of the plaintiff." *Fourthly*, the record in the chancery suit of Towner's administrator, to which Robert A. Lucas was a party, is conclusive upon all the points presented upon this instruction, so long as the decree in that cause remains unreversed.—(*Baylor's lessee vs. Dejarnette*, 13 *Grat.*, 174.)

Seventhly.—The court did not err in rejecting the instruction contained on the 77th page of the record, and which was as follows: "If the jury find from the evidence that the debts secured by the deeds of trust from the said Edward Lucas to R. H. Lee and Henry Berry, were assigned to James H. Shepherd, as trustee for Catharine S. Lucas, and that the said Rezin D. Shepherd was not the owner of said debts at the time of the sale under the decree of the Circuit Court of Jefferson County, that proceeding cannot defeat the title of the trustees to the deeds of trust to secure their payment, although they may have been audited and credited to him in that proceeding, unless the said James H. Shepherd and Catharine S. Lucas, were parties to that proceeding." This instruction was properly rejected, *first*, because wholly irrelevant to any proper issue in the cause. *Secondly*, because the answer of Robert A. Lucas, in the chancery cause of Towner against Lucas, and the whole proceedings in that case show, that as late as 1859, these debts were recog-

nized to be the property of Rezin D. Shepherd, without question or controversy, and that the assignment of those claims to Robert A. Lucas, was solely for the *benefit of Rezin D. Shepherd. Thirdly*, because those pretended assignments from Robert A. Lucas to James H. Shepherd, as trustee for Catharine A. Lucas, were of recent execution and written probably some twenty years after the time that they professed to bear date. *Fourthly*, if the said assignments had been genuine, and the rights in all respects such as were claimed by the defendant, they constituted but an equitable claim to a portion of the purchase-money in the hands of Rezin D. Shepherd, and were not proper subjects of consideration in this action of ejectment.

Eighthly.—The court did not err in the construction which it placed upon the letter of Rezin D. Shepherd, which accompanied his will, and was adressed to his legatees and devisees, as embracing some private and individual wishes of his own, but leaving even them, subject to their discretion. It was in no sense a *testamentary paper*, and cannot be referred to as controlling or modifying the disposition which the testator had made of his property by his will. If it were a testamentary paper, it should have been admitted to probate with the will.—(1 *Williams on Executors*, 341.) The omission or refusal of the Court of Probate to regard it as a testamentary paper, is conclusive upon this court. The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will. If any error has been com-

mitted in admitting to probate a will which ought not to be probated, or in omitting to probate a testamentary paper which ought to have accompanied the will, the remedy is alone in the state courts.—(*Tarver vs. Tarver and others*, 9 *Peters.*, 174; *Fouvergne et al. vs. City of New Orleans et al.*, 18 *How.*, 470.) But if that letter were a testamentary paper, there is nothing in its contents which could make it admissible evidence in this action of ejectment.

Ninthly.—The equitable pretentions set up in this defence, either to this land itself or to any portion of the purchase-money of this land, are wholly without any just foundation. The only paper sought to be used in evidence, and which bears the signature of R. D. Shepherd to any assignment, is a transfer made by R. D. Shepherd, on the 26th day of November, 1859, to James H. Shepherd, for the use of Catharine A. Lucas, of that *balance* of the sum decreed to him against the estate of Edward Lucas and Robert A. Lucas, which remained *after the application of the net proceeds of the land* to the payment of the liens (page 31, of the printed record). The other assignments made by Robert A. Lucas, and which are to be seen on pages 74 and 75 of the printed record, are antedated some twenty years, and are contradicted and overthrown by the answer of Robert A. Lucas, and the other proceedings in the chancery cause of Towner's administrator against Lucas, &c. But viewing all this in the most favorable aspect in which it could be presented for the defence, with all the loose and inadmissible conversations of R. D. Shepherd, it presents a subject of inquiry altogether irrelevant to an action of ejectment, and

only proper for a court of equity. There are but two cases, and those particularly prescribed by statute, in which an equitable defence can be made to an action of ejectment in Virginia or West Virginia.—(*Code of West Virginia, Ch.* 90, *page* 520; *Davis et al. vs. Teays*, 3 *Grat.*, 283.)

Tenthly.—Many letters are introduced written by Rezin D. Shepherd to one of his brothers in the county of Jefferson, some of them referring to his connection with the estate of a deceased brother, James Shepherd, in the State of Louisiana. It is difficult to see what relevancy these letters can have to any issue properly arising in this ejectment suit. It may, however, not be impertinently here stated, in vindication of the honor and integrity of that excellent man, that all matters in any wise connected with the estate of James Shepherd, in Louisiana, have been the subject of thorough and protracted investigation since his death in the courts of Louisiana, and that they have resulted in the triumphant defeat by Mr. Shepherd's executors, in all the courts of that state, of all claims or demands against his estate.

Eleventhly.—The court did not err in rejecting the instruction, pages 75 and 76 of the printed record, touching the issuing by William A. Chapline of a distress warrant, subsequent to the first of April, 1870. The law upon that point is correctly expounded by the court, page 77 of the printed record, leaving the facts to be determined by the jury upon the evidence submitted to them. Upon that evidence the jury found that this distress warrant was issued without the knowledge or authority of the plaintiff, or his counsel.

Judge Day

Supreme Court of the United States.

ROBERT A. LUCAS, PLAINTIFF IN ERROR,

vs.

PETER C. BROOKS, JR.

Supplemental Brief.

Although yesterday was the day fixed by the court for the consideration of this case, I have, so far, neither received nor seen any brief of the plaintiff in error. My original brief was filed with the clerk, and copies delivered in person, and sent by mail, to the opposite counsel. But I have seen no copy of their brief.

I omitted, in my original brief, to notice one point of error which is alleged in the record, but which escaped my attention.

It will be seen by reference to pages 61, 62, 63, 64, 65, 66, and 67 of the printed record, that Robert A. Lucas, the defendant in the court below, offered in evidence three records from the Circuit Court of Jefferson County, authenticated by the signature of William A. Chapline, clerk of that court, by the seal of the court, and also by the certificate of Joseph A. Chapline, Judge

of the Sixth Judicial Circuit of West Virginia. These records were rejected as evidence by the court because they were wholly irrelevant to any proper issue arising in the action of ejectment.

Immediately thereafter, as will be seen by referring to pages 67, 68, and 69 of the printed record, another paper was offered in evidence, purporting to be a record from the same court, bearing the signature of "James D. Fayman, deputy for William A. Chapline, Clerk, C. C." This paper was rejected by the court as evidence,—

First. Because it was unaccompanied by any evidence that James D. Fayman had ever qualified as a deputy clerk, or was authorized to use the name of the clerk in any official certificate.

Secondly. Because said certificate was without the authentication of the seal of that court.

It is submitted that there is no law of Congress which prescribes the mode in which the records of a state court shall be authenticated so as to be receivable as evidence in the District or Circuit Courts of the United States in the same state. In the absence, then, of any statutory provision on that subject, or of any rule of the court itself, the doctrines of the common law, as they are recognized in all the elementary works on evidence, should govern its admissibility.

The record of a judicial proceeding from a court other than that in which the cause is being tried, cannot be admitted in evidence unless authenticated by the seal of the court or proved by means of a sworn copy.—(1 *Starkie on Evidence*, 258 *to* 265; 1 *Greenl. Ev., sec.* 501.)

But it may be contended that the same mode of authenticating a record which would make it admissible in

another court of the same State, should make it admissible in a court of the United States held in that State. No such point of practice or evidence, it is believed, has yet been sanctioned and approved by the Supreme Court, and the District and Circuit Courts have been left, in some measure, to their own discretion, to be governed by the rules of the common law, or by the practice of the State courts, as they might deem it right and expedient. If a document comes before them marked by any circumstances of suspicion, they might well be allowed to apply a sterner rule to its admissibility than they would do if it were altogether free from suspicion. In this case the three records first presented and offered in evidence, but rejected for irrelevancy, were all authenticated in an unexceptionable manner. The last was rejected because unaccompanied by anything upon the face of it which gave evidence of its genuineness.

The *Code of West Virginia*, *chapter* 130, *section* 5, *page* 615, says: "A copy of any record or paper in the clerk's office of any court, &c., &c., attested by the *officer* in whose office the same is, may be admitted as evidence in lieu of the original." This is not a certificate by the *clerk*, it is not a certiificate by the *officer* in whose office the original is. It is a certificate of James D. Fayman, who professes to be a deputy clerk. "I, James D. Fayman, deputy for William A. Chapline, &c., &c., do certify," &c., &c. It does not profess to be the act of the principal performed through his deputy, but the act of the deputy by virtue of an authority supposed to exist in him by virtue of his appointment as such. It is not unlike the case of *Pendleton vs. Smith*, decided by the Supreme Court of Appeals of West Virginia, and reported 1 *West Virginia R.*, 16. In

that case, the attachment concluded as follows: "Witness, J. R. Naylor, clerk of our said court, &c., S. G. Naylor, deputy clerk." In that case the court decided, that writs, summonses, and other process, must be attested by the clerk in his own proper name, or it may be done by his deputy placing the name of his principal to the process.

In the case now under consideration, the defendant obtained, through the personal examination of the clerk, William A. Chapline, every fact which that rejected record could have proved. He established the issuing of the warrant of distress, its date, and every fact material to enable him to obtain that instruction from the court to the jury, which is contained in pages 77 and 78 of the printed record. The court propounded the law as requested by the defendant, assumed the existence of the distress warrant as fully as that record could have established it, and left it to the jury to determine whether that distress warrant had not been issued without the knowledge and authority of the plaintiff and his counsel. And the jury, upon the evidence, found that it had been so issued without such knowledge or authority.

CHARLES J. FAULKNER,
Of Counsel for the Defendant.